United States Court of Appeals

for the Second Circuit

APPENDIX

74-1110

B

P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

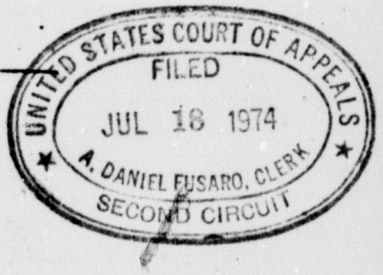
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PETER GRADOWSKI,

Defendant-Appellant



APPENDIX OF DEFENDANT-APPELLANT

JOHN H. DOYLE, III
Attorney for Defendant-Appellant
600 Fifth Avenue
New York, New York 10020
(212) 541-8100

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UNITED STATES COURT OF APPEALS
FILED
MAY 30 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

D. C. Form No. 100

CRIMINAL DOCKET JUDGE TYLER 73 CRIM. 841

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
v.	John R. Bush, AUSA
RICHARD NASH 1-10 & 11	264-6437
PETER GRADOWSKI 1-10 & 12	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(05) [illegible]					
Fine,					
Clerk,					✓
Marshal,					
Attorney,					
Commissioner, [illegible]					
Witness Secs. 2113(e) Unlawfully receiving stolen property from an insured bank (Cts. 1-4).					
18:1341&2 Unlawfully using the mails to defraud. (Cts. 5-10)					
18:1342 Use of fictitious name (Cts. 11-12)					

DATE	PROCEEDINGS
9-4-73	Filed indictment. (Related to 73Cr.364--73Cr610)
9-14-73	PETER GRADOWSKI-deft arraigned. Pleads not guilty. Deft cont'd remanded in lieu of bail fixed ($35,000-cash or surety) motion to reduce bail denied. Tyler, J.
9-25-73	P. Gradowski-renewed application for reduction of bail, DENIED. Tyler, J
9-26-73	P. GRADOWSKI-filed MEMO-END. on application for discovery and particulars, dated 9-25-73...production and inspection of grand jury minutes [illegible]

JUDGE TYLER

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
10-2-73	Conference held. Trial as to both deft re-scheduled for 10-15-73. Defts' brief submitted on Gradowski motion to suppress. Tyler, J.		
10-4-73	Hearing cont'd on deft Gradowski motion to suppress (deft not present) Decision reserved. Tyler, J.		
10-9-73	P. GRADOWSKI-Court denies Deft. Gradowski's motion to suppress. Trial adj'd to 10-16-73. Tyler, J.		
10-23-73	Filed Memorandum of Law on behalf of Peter Gradowski.		
10-23-73	Filed OPINION#39249...Accordingly, defts motion to suppress is denied in all respects on substantially the same grounds as was an earl similar motion of co-deft Richard Nash. Tyler, J (mn)		
10-16-73	RICHARD NASH(atty Jerome Londin present)pleads GUILTY to each of counts 1 thru 11. Pre-sentence investigation ordered. Report due 11-8-73. Sentence adj'd sine die. Deft, continued remanded in lieu of bail.		
10-16-73	PETER GRADOWSKI(Atty John Doyle present)Trial begun with Jury on each of counts 1 thru 10&12.		
10-17-73	Trial cont'd.		
10-18-73	Trial cont'd -Jury deliberating.		
10-19-73	Trial cont d .Jury contd. Jury continues deliberating. Jury Verdict: GUILT on cts. 1 thru 4 (the jury further found that the checks in questic in cts. 1 thru 4 were each valued more than $100.00) Not guilty on cts. 5&6. GUILTY on Ct. 7. Not Guilty on Ct. 8 .GUILTY on Ct. 9. Not Guilty on Ct. 10. GUILTY on Ct. 12. Presentence investigati ordered. Sentence adj d to 11-23-73 at 2:15 p.m. Deft. cont d remain custody of U.S. Marshal. Tyler, J.		
1-23-73	P. GRADOWSKI-(atty present) Filed JUDGMENT-deft is hereby committed to custody of the Atty General or his authorized representative for im sonment pur. to Sec. 4208(b) of T. 18, US Code for study, report and re mendations as described in Sec. 4208(c). This commitment is deemed to for the maximum sentence prescribed by law, unless altered pur to sa upon the receipt of the report and recommendations. The result together with any recommendations which the Court in the Premises believes would be helpful [illegible] Tyler, J.		

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C. 1-3 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date for Judgment
11-28-73	P. GRADOWSKI- filed notice of appeal from judgment ent. 11-23-73. Mailed copies to John H. Doyle,Esq., & U.S. Atty.	
11-30-73	RICHARD NASH- Atty present- Filed JUDGMENT- Deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of FIFTEEN (15) MONTHS on count 5. (Deft is to be given credit for time already served) On each of counts one through four, the imposition of sentence is suspended. On each of counts six through eleven, the deft is sentenced to the custody of the Atty General for imprisonment for a period of FIVE (5) YEARS on each count, sentence imposed on counts six thru eleven is SUSPENDED and the deft is placed on probation for a period of FOUR (4) YEARS subject to the standing probation order of this Court. Probation to commence upon expiration of prison sentence imposed on count five. Tyler,J. mn 11-6-73 commitments issued.	
12-7-73	P. GRADOWSKI- filed ORDER that the Court's order ent. on 11-23-73 is amended to provide that the study of deft shall commence forthwith without prejduce to the right of deft to appeal from the final judgment of conviction to be entered herein. Tyler,J. mn	
1-3-74	Filed transcript of record of proceedings dtd 10-16-73.	
1-3-74	Filed transcript of record of proceedings dtd 10-16-73 & 1123-73.	
1-28-73	P. GRADOWSKI-filed remand dtd 9-14-73.	
12-18-73	P. GRADOWSKI- filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.	
1-4-74	P. GRADOWSKI- Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.	
4/3/74	Filed transcript of proceedings dated 2/6/74.	
4/10/74	Filed stipulation that the appeal in this case of deft P. Gradowski is dismissed without prejudice to the right of deft to appeal from final sentence to be imposed by the Court prusuant to 18 US Code Sec. 4208(b).	
5/7/74	Filed govt's bill of particulars.	

3a

DATE	PROCEEDINGS	Date of Judgment
5/17/74	PETER GRADOWSKI- Filed JUDGMENT (atty present) deft having on 11/23/73 been committed to the custody of the Atty General or his authorized representative pursuant to T 18, U.S. Code, Section 4208 (b) for a study and report as described in T.18 U.S. Code, Section 4208 (c) and the Court having now received and considered the report of such study It is adjudged that the deft is sentenced to the custody of the Atty General for imprisonment for a period of FIFTEEN (15) YEARS on each of counts one, two three and four, sentences to be served CONCURRENTLY with each other. It is adjudged that the imposition of sentence is suspended on each of counts seven, nine and twelve and the deft is placed on Probation for FIVE (5) YEARS subject to the standing Probation Order of this Court. The period of Probation is to immediately follow the termination of the prison sentence imposed on each of counts one, two three and four. Tyler, J.	
	5/20/74 Issued commitment.	5/20/74.
May20/74	Filed deft P. Gradowski's notice of appeal from judgment dtd 5/17/74. Mailed copies. Leave to file appeal in forma pauperis is granted. Tyler, J.	

4a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

RICHARD NASH, a/k/a Gary Essig and
PETER GRADOWSKI, a/k/a Murray Fischer,

Defendants.

INDICTMENT

S 73 Cr. 311

Introduction

1. From on or about the 1st day of September, 1972 up to and including the 14th day of April, 1973, in the Southern District of New York and elsewhere, RICHARD NASH and PETER GRADOWSKI, the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly did devise a scheme and artifice to defraud The Chase Manhattan Bank, N.A., Franklin National Bank and Bankers Trust Company and diverse others (hereinafter called the "defrauded persons") and to obtain money and property from the defrauded persons by means of false and fraudulent pretenses, representations and promises.

2. It was a part of the scheme and artifice that RICHARD NASH and PETER GRADOWSKI, the defendants, obtained possession of certain blank checks, to wit, printed checks designed for use by the Public Service Electric and Gas Company and the Virginia Electric and Power Company on their accounts at The Chase Manhattan Bank, N.A., knowing said checks to have been taken and carried away, with intent to steal and purloin, in violation of Section 2113(b) of Title

18, United States Code, from said bank, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

3. It was further a part of said scheme and artifice that RICHARD NASH and PETER GRADOWSKI, the defendants, caused four of the aforementioned blank checks (hereinafter collectively called the "Spurious Checks") to be inscribed so that they were payable to the following false and fictitious persons in the amounts set forth below:

Check	Amount	False and Fictitious Person
Public Service Electric and Gas Company Check No. 31420027	$106,575.00	Gary Essig
Public Service Electric and Gas Company Check No. 31419955	$177,588.75	Murray Fischer
Virginia Electric and Power Company Check No. 31420487	$38,750.00	Gary Essig
Virginia Electric and Power Company Check No. 31420488	$42,625.00	Murray Fischer

4. It was a further part of said scheme and artifice that RICHARD NASH and PETER GRADOWSKI, the defendants, using the aforementioned false and fictitious names, Gary Essig and Murray Fischer, opened checking accounts at the banks set forth below, among others, and deposited the Spurious Checks in said checking accounts and used and attempted to use said checking accounts and checks drawn thereon to collect the sums of money inscribed on the Spurious Checks:

Checking Account	False and Fictitious Name
The Chase Manhattan Bank, N.A.	Gary Essig
Bankers Trust Company	Murray Fischer
Franklin National Bank	Gary Essig

Counts One through Four

The Grand Jury charges:

1. The allegations contained in the Introduction of this Indictment are repeated and realleged as though fully set forth herein.

2. On or about the dates hereinafter set forth, in the Southern District of New York, RICHARD NASH and PETER GRADOWSKI, the defendants, unlawfully, wilfully and knowingly did receive, possess, conceal and dispose of money and property exceeding $100 in value, to wit, the Spurious Checks respectively set forth below, knowing said money and property to have been taken and carried away, with intent to steal and purloin, in violation of Section 2113(c) of Title 18, United States Code, from The Chase Manhattan Bank, N.A., New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation:

Count	Date	Approximate Value of Money and Property
1	December 1, 1972	$105,575.00
2	December 1, 1972	$177,538.75
3	December 5, 1972	$ 42,625.00

December 5, 1972 $ 38,750.00

(Title 18, United States Code, Sections 2113(c) and 2.)

JMcGobj
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Counts Five through Ten

The Grand Jury further charges:

1. The allegations contained in the Introduction to this Indictment are repeated and realleged as though fully set forth herein.

2. On or about the dates hereinafter set forth, in the Southern District of New York, RICHARD NASH and PETER GRADOWSKI, the defendants, unlawfully, wilfully and knowingly, for the purpose of executing the scheme and artifice set forth in the Introduction of this Indictment, did place and cause to be placed in post offices and authorized depositories for mail certain letters to be delivered by the Postal Service, to wit, the letters addressed as hereinafter set forth, and thereby knowingly caused said letters to be delivered by mail according to the directions thereon:

Count	Date	Sender	Addressee
5	November 14, 1972	Irving Trust Company One Wall Street New York, N.Y.	Inter-Trans Personnel Department 133 E. 58th Street New York, N.Y.
6	November 22, 1972	Franklin National Bank 450 Park Ave. New York, N.Y.	Mr. Luis Conrio Intertrans 133 E. 58th St. New York, N.Y.
7	November 24, 1972	Bankers Trust Company 605 Third Ave. New York, N.Y.	Inter-Trans, Inc. 133 E. 58th St. New York, N.Y.

8	November 24, 1972	The Chase Manhattan Bank, N.A. 25 East 57th St. New York, N.Y.	Inter-Trans, Inc. 133 E. 58th St. New York, N.Y.
9	November 27, 1972	Inter-Trans, Inc. 133 E. 58th St. New York, N.Y.	Bankers Trust Company 605 Third Ave. New York, N.Y.
10	Late November or early December, 1972	Franklin National Bank 450 Park Ave. New York, N.Y.	Gary Essig 200 W. 20th St. New York, N.Y.

(Title 18, United States Code, Sections 1341 and 2.)

mmcwj
73-0283

Count Eleven

The Grand Jury further alleges:

1. The allegations contained in the Introduction and in Counts Five through Ten of this Indictment are repeated and realleged as though fully set forth herein.

2. From on or about the 1st day of September, 1972 up to and including the 14th day of April, 1973, in the Southern District of New York, RICHARD NASH, the defendant, unlawfully, wilfully and knowingly, and for the purpose of conducting, promoting and carrying on the scheme and artifice set forth in the Introduction and in Counts Five through Ten of this Indictment, did use, assume and request to be addressed by a fictitious, false and assumed name, to wit, Gary Essig.

(Title 18, United States Code, Section 1342).

Count Twelve

The Grand Jury further alleges:

1. The allegations contained in the Introduction and in Counts Five through Ten of this Indictment are

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repeated and realleged as though fully set forth herein. 10a

2. From on or about the 1st day of September, 1972 up to and including the 14th day of April, 1973, in the Southern District of New York, PETER GRADOWSKI, the defendant, unlawfully, wilfully and knowingly, and for the purpose of conducting, promoting and carrying on the scheme and artifice set forth in the Introduction and in Counts Five through Ten of this Indictment, did use, assume and request to be addressed by a fictitious, false and assumed name, to wit, Murray Fischer.

(Title 18, United States Code, Section 1342.)

FOREMAN

PAUL J. CURRAN
United States Attorney

EXCERPT FROM JUDGMENT

JUDGMENT AND COMMITMENT (Rev. 2-68) Cr. Form No. 25

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED MAY 17 1974 S. D. OF N.Y.

United States of America

v.

PETER GRADOWSKI

No. 73 Crim. 841 HRT

On this 17th day of May, 1974 came the attorney for the government and the defendant appeared in person and[1] John Doyle III, Esq., counsel.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury has been convicted of the offense of: the defendant unlawfully, wilfully and knowingly did devise a scheme and artifice to defraud the Chase Manhattan Bank, N.A., Franklin National Bank and Bankers Trust Company and diverse others, and to obtain money by means of false and fraudulent pretenses, representations and promises. The deposits of said Banks were then insured by the Federal Deposit Insurance Corporation. The defendant, for the purposes of executing the scheme and artifice to defraud, did place in Post Offices for mail certain letters to be delivered by the Postal Service. The defendant did unlawfully, and for the purposes of promoting and carrying on the scheme to defraud did use, and requested to be addressed by a false and fictitious and assumed name, to wit, Murray Fischer.

In violation of: Title 18, Secs. 2113(b),(c) and (2), U.S.C..
Title 18, Secs. 1341 and 2., & Sec. 1342, U.S.C..

as charged[3] in counts 1,2,3,4,7,9, & 12

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

and having on November 23, 1973 been committed to the custody of the Attorney General or his authorized representative pursuant to Title 18, U.S. Code, Section 4208(b) for a study and report as described in Title 18, U.S. Code, Section 4208(c) and the Court having now received and considered the report of such study,

It Is Adjudged that the defendant is sentenced to the custody of the Attorney General for imprisonment for a period of FIFTEEN (15) MONTHS on each of counts one, two, three and four, sentences to be served CONCURRENTLY with each other.

IT IS ADJUDGED that[3] the imposition of sentence is suspended on each of counts seven, nine and twelve and the defendant is placed on Probation for FIVE (5) YEARS, subject to the standing Probation Order of this Court.

The period of Probation is to immediately follow the termination of the prison sentence imposed on each of counts one, two, three and four.

MICROFILM MAY 22 1974

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

11a

A. R. Tyler

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

-against-

RICHARD NASH and PETER GRADOWSKI,

Defendants.
----------X

FILED
U.S. DISTRICT COURT
OCT 23 3 52 PM '73
S.D. OF N.Y.

OPINION

73 Cr. 841 HRT

#39949

FILED
OCT 24 1973

PAUL J. CURRAN, ESQ., United States Attorney, Southern District of New York, Attorney for the Government, by JOHN N. BUSH, ESQ., Assistant United States Attorney, of counsel.

ANDERSON, RUSSELL & KILL, ESQS., New York City, by John H. Doyle, III, Attorney for defendant.

TYLER, D.J.

Defendant Peter Gradowski was indicted on September 4, 1973 for wilful possession of stolen bank checks and mail fraud under 18 U.S.C. §2113(c), 18 U.S.C. §1341, and 18 U.S.C. §1342. Defendant filed a pretrial motion to suppress certain documents seized from a car

belonging to him on April 13, 1973. At the time of the seizure of the documents, Gradowski and a co-defendant, Richard Nash, were still fugitives from justice despite issuance of warrants for their arrest in January, 1973.

On June 16, 1973 this Court held a hearing on a suppression motion of co-defendant Richard Nash directed to the same search, and on July 17, 1973, the Court entered its findings of fact and conclusions of law, upholding the search as to the co-defendant Nash.

Co-defendant Gradowski, whose arrest was not effected until after the Nash suppression motion had been decided, has based his motion upon the transcript of the prior suppression hearing to establish the facts.

Mr. Gradowski asserts that the search of his car and the seizure of articles therefrom on April 13, 1973 were in violation of his constitutional rights under the Fourth Amendment. An analysis of the facts set forth below leads this Court to the conclusion that the search and subsequent seizure were constitutionally permissible. Defendant's motion is denied for the reasons set forth below.

Prior to February 6, 1973, federal arrest warrants were issued for Gradowski and Nash in connection with an alleged scheme to defraud certain banks. On or shortly before February 6, special agents Anthony Scuderi and Richard McMullen of the Babylon office of the Federal Bureau of Investigation ("FBI") received instructions from the Bureau's New York office, which was in charge of the substantive investigation of this case, to assist in locating and arresting one or both defendants on Long Island.

On February 6, 1973, agents Scuderi and McMullen went to the home of Nash's sister and brother-in-law, Mary and George Hammer, in Sound Beach, Suffolk County, New York. The agents spoke to Mr. Hammer and advised him of the import of the federal statute making the harboring of fugitives a crime. Although not overly communicative, Hammer did inform the agents that either Nash or Gradowski owned a green Cadillac automobile.

On the afternoon of April 13, 1973, agents Scuderi and McMullen returned to the Hammer residence and noticed a green Cadillac convertible parked at the rear of the Hammer property. Mr. and Mrs. Hammer, stating that they were acting on advice of counsel, initially refused to

spoak to the agents. However, in response to a question concerning the ownership of the Cadillac, Mr. Hammer replied that it belonged to a friend.

At that point, agents Scuderi and McMullen suspected that Gradowski and Nash were in the house because of the presence of the Cadillac and the Hammers' refusal to reveal the ownership of the car. The agents took down the license number of the Cadillac and drove to the headquarters of the sixth precinct of the Suffolk County Police Department located in Coram, New York. There they ascertained that the car was registered in the name of co-defendant Gradowski. The agents advised the Suffolk County detectives of their belief that the defendants were in the Hammer house and asked them for assistance. Specifically, Scuderi and McMullen requested that a "sector" car be sent to prevent the Cadillac from leaving the Hammer premises while the agents and detectives sped to the scene.

Upon returning to the Hammers' house, agent McMullen asked Mr. Hammer why he had not revealed the ownership of the Cadillac. Mr. Hammer replied that he thought the agents knew whose car it was. Thinking that the defendants might be hiding in the Hammers' house, the agents advised the Hammers that they would like to search the house.

The agents followed Mr. Hammer throughout the house, searching only in areas large enough to secrete an individual. Gradowski and Nash were nowhere to be found. Upon returning to the kitchen area, the agents asked Mr. Hammer how he obtained possession of the car. Mr. Hammer replied that a man who had identified himself as "Jack" had telephoned asking to leave Mr. Gradowski's Cadillac on the Hammer premises.

Agent Scuderi then accompanied certain Suffolk County patrolmen on a scouting mission to look for Gradowski in a nearby location. The patrolmen advised Scuderi that they had had previous contact with Gradowski and were aware that he had on numerous occasions stayed in a house near the Hammer home. At about this time, agent McMullen stated to Mr. Hammer his desire to search the Cadillac. Mr. Hammer directed Mrs. Hammer to retrieve the keys whereupon Mr. Hammer handed the keys to McMullen.

Approaching the car, agent McMullen looked inside and observed that the Cadillac had been used as a place in which to sleep and eat. Without opening a door or window, he observed partially remaining scraps of food and the containers of a "fast-food" establishment; also immediately visible was an unrolled sleeping bag.

Thereafter, with one of the keys turned over by Mr. Hammer, McMullen opened the trunk of the car. In so doing, McMullen at once found and scanned various papers, including hotel bills and gas and car repair receipts. Most of the papers were located in a large red manila envelope, but some were scattered loose about the trunk. Concluding that the documents might be of some aid in the apprehension of the defendants, McMullen collected the papers and stuffed them into the open envelope. Upon agent Scuderi's return to the house, McMullen delivered the envelope to him.

Among the documents seized were bank checks and various bank documents which are the object of this motion to suppress.

It is well settled under the Fourth Amendment that a search conducted without the authorization of a warrant issued upon probable cause is "per se unreasonable... subject only to a few specifically established and well delineated exceptions." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Almeida-Sanchez v. United States, ____U.S.____, 41 U.S.L.W. 4970 (June 21, 1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1970). In the absence of a search warrant, the government assumes the burden of persuasion that one of these narrowly-construed exceptions has been met.

One of these well-established exceptions to the per se unreasonableness of a warrantless search is a search conducted pursuant to a valid consent. Vale v. Louisiana, 399 U.S. 30, 35 (1970). A consent search is not a waiver of a constitutional right. Rather, because the Fourth Amendment prohibits only unreasonable searches, a consent is conduct on the part of the occupant which renders the search reasonable. Schneckloth v. Bustamonte, 412 U.S. 218, 243 n.31 (1973).

A consent validates the search as long as the consent was freely and voluntarily given. Whether a consent is in fact voluntary or is the product of coercion is a question of fact to be determined from the totality of all the circumstances. In its most recent pronouncement concerning the validity of a consent, the Supreme Court in Schneckloth cited two competing concerns that must be accommodated in determing the meaning of a voluntary consent - - the legitimate need for such searches and the equally important requirement of assuring the absence of coercion. The Court stated:

> "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." Id. at 229.

A careful scrutiny of the surrounding circumstances of this case leads this court to the conclusion that the consent was voluntarily given.

In response to agent McMullen's statement, "I would like to search the Cadillac, "Mr. Hammer turned to his wife and said "[G]et the keys." Mrs. Hammer returned with the keys of the Cadillac and gave them to Mr. Hammer who handed the keys to agent McMullen.[1/]

Moreover, subsequent to the search and seizure of the documents, agent McMullen told the Hammers that the agents were taking the manila folder they had found, whereupon Mr. Hammer stated:

> "Look, I want you to take the keys of this car. I want you to take the car.... I don't want anything to do with it. I am not involved with these individuals, and they have caused me enough trouble.... Here are the keys to the car, and I would like you to remove the car from my property."

Agent Scuderi took possession of the keys and gave Mr. Hammer a receipt for them.[2/]

1/ In United States v. Gaines, 441 F.2d 1122 (2d Cir. 1971), cert. denied, 409 U.S. 883 (1972), the defendant merely pointed to his jacket in response to a request for identification made by the officers. The court found a valid consent and admitted into evidence counterfeit bills that were uncovered as a result of the search.

2/ The keys were returned to Mr. Hammer on April 27, 1973.

Mr. Hammer's behavior in handing over the car keys to the agents, coupled with his request that the agents relieve him of the car altogether, is conduct tantamount to a consent, thus rendering the search reasonable. A person consenting to a search need not have a positive desire that the search be conducted in order for his consent to have been voluntary and effective. United States v. Thompson, 356 F.2d 216, 220 (2d Cir. 1965), cert. denied, 384 U.S. 964 (1966). The Hammers were neither overborne by the superior authority of the agents nor were they subjected to other forms of coercion, blatant or subtle. To the contrary, the Hammers had experienced prior contact with these same agents and had felt free on a previous occasion to refuse requests of the agents pursuant to advice of counsel.

Gradowski submits that any consent which the Hammers might have given was tainted by an earlier search of the house. This argument is without merit. Upon returning from the Suffolk County Police Headquarters following determination of the registry of the Cadillac, the agents requested a search of the house. The sudden appearance of the car and the knowledge that the defendants were in the area led them to believe that the fugitives were hiding in the Hammers' house. Mr. Hammer accompanied the agents on an exploratory tour of the house. The search was superficial with Mr. Hammer directing the agents to locations

sizeable enough to secrete one or both defendants. No fugitives were discovered nor any evidence seized. The intrusion of the agents was slight and the nature of the search was non-coercive. While the search of the house is one factor to be assessed along with all other circumstances, it is in no way determinative. 3/

In determining whether a person other than a defendant has authority to consent to a search of the defendant's property, the focal point is whether the consenting party had "joint access" to that property. While the Cadillac belonged to Gradowski, Nash as well as the Hammers had equal access to the car. Nash had contributed financially to the maintenance of the car, and on occasion, had lent the car to persons without the approval of Gradowski. Furthermore, Nash testified that he had possession of the car sixty to seventy per cent of the time.

Nash was in custody of the car when he and a friend drove the car to the Hammers' house and left it there with the authorization of the Hammers. Nash told the Hammers that he would come to pick up

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3/ As announced to counsel prior to the date of this memorandum, I lean to the view that my original conclusion, announced on July 17, 1973, that the limited search of the house was illegal, is erroneous. As indicated, however, either conclusion on this issue is not determinative of the car search questions.

the car at a later date. In response to a question as to whether he gave the Hammers permission to drive the car, Nash responded, "[T]hey have standing permission to drive it." The Hammers clearly qualified as joint users of the vehicle along with Nash. The consent to the search was thus effective as given by one whose right to the occupancy or possession of the car was at least equal to that of the person contesting the search. United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972).

It is well-established that one endowed with rights to the use and occupation of premises may authorize search of the premises, and evidence thus discovered can be used against his cohabitant. Frazier v. Cupp, 394 U.S. 731 (1969); United States v. Cataldo, 433 F.2d 38 (2d Cir. 1970), cert. denied, 401 U.S. 977 (1971). 4/

4/ In Frazier v. Cupp, the Supreme Court held that evidence seized from defendant's duffel bag in a search authorized by a joint user was admissible. The Court found that the defendant had assumed the risk that his cousin with whom he shared the bag would allow police to search it. In United States v. Cataldo, supra, the Second Circuit held that a joint tenant of an apartment had authority to consent to the entry by federal agents into a cotenant's separate bedroom.

Although perhaps unnecessary to discuss in light of the foregoing, another legal theory tends to support denial of the motion to suppress. A warrantless search can also be upheld when it comes within the "automobile exception" to the warrant requirement. In Carroll v. United States, 267 U.S. 132 (1925), the Supreme Court recognized the necessity of distinguishing between a search of an immobile structure and a search of an automobile "...where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Id. at 153.

The "exigent circumstances" required to bring the instant case within the Carroll exception are present. The Cadillac had apparently just been left at the location where the agents found it. There was evidence that the car had recently been used to provide a place in which to sleep and eat. A federal magistrate was located thirty-five to forty miles away. Certainly, the opportunity to search the car was fleeting since the car could readily have been moved or its contents destroyed in the event the agents were to leave without more. While this factor is not determinative, its significance increases with the knowledge that the defendants were not in custody and had been successful in eluding the FBI. for a number of months.

The Second Circuit has attributed significance to the fact that the agents were not searching the automobile merely for evidence against suspects already in custody. United States v. Ellis, 461 F.2d 962 (2d Cir. cert. denied, 409 U.S. 866 (1972). 1972). / As noted, the agents thought that the automobile contained evidence which might aid in the apprehension of the two criminals still at large and that waiting for a warrant might enable them to evade capture. Neither McMullen nor Scuderi was a case agent engaged in developing the evidence against defendants. Rather, their activities were confined to a more narrow goal - - the apprehension of elusive suspects. The justification for the intrusion by the agents into the automobile was "immediate and constitutionally reasonable." Cady v. Dombrowski, ____U.S.____, 41 U.S.L.W. 4995 (U.S. June 21, 1973).

Accordingly, defendant's motion to suppress is denied in all respects on substantially the same grounds as was an earlier, similar motion of co-defendant Richard Nash.

Dated: October 23, 1973

J. R. Tyler, J.
U.S.D.J.

mbds HEARING ON MOTION TO SUPPRESS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-v- : 73 Cr. 610

RICHARD NASH and PETER GRADOWSKI, :

Defendants :

----------x

Before:

HON. HAROLD R. TYLER, JR.,
District Judge

New York, New York
July 16, 1973--10:30 a.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney,
For the Government
BY: JOHN N. BUSH, ESQ.,
Assistant United States Attorney,
of Counsel

ROLAND THAU, ESQ.,
Attorney for defendant Nash

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MR. BUSH: Government ready.

MR. THAU: Good morning, your Honor. Your Honor, defendant is ready for a motion to suppress evidence herein, of which notice was sent to your office concerning it.

THE COURT: It was? If it was, I never received it.

MR. THAU: You didn't?

THE COURT: No.

MR. THAU: I spoke to Mr. Glazer last week. It was my recollection several weeks ago that your Honor said that Mr. Bush and I -- and this was said at a time when Mr. Bush did not appear; I think Mr. Figueroa appeared for Mr. Bush -- that Mr. Bush and I should get together on discovery, which was done, and that your Honor should then be advised orally of such motions as would be made. I spoke to Mr. Glazer, I would say, about a week ago, I guess.

THE COURT: I won't deny you on that. It's news to me, but in any event, you have a motion to suppress. What are you moving to suppress.

MR. THAU: Your Honor, Mr. Bush gave me photocopies of an enormous number of documents. At that time Mr. Bush did not specifically apprise me, although I think he is in a position to do so now, what part of that documentation was seized from the car of one Mr. Gradowski, and it is that particular part of the records, copies of which he gave me,

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which I am seeking to suppress, and I supposed that Mr. Bush ought to apprise at this time what it is that came from the Gradowski car.

THE COURT: Before we begin here, this is one of these cases which already has every earmark of creating more problems, through no one's fault, than one can describe, but first of all, are we trying this case under a superseder?

MR. BUSH: Yes, your Honor.

THE COURT: I thought so. There is a presumption that we try all of these cases under superseders the last several years. That would be, therefore, 73 Cr.610; is that correct?

MR. THAU: That's correct, your Honor.

THE COURT: That takes care of that. Apparently the claim is that a lot of material was seized from the car of co-defendant Gradowski, who is not available, being a fugitive, isn't he?

MR. BUSH: That's correct, your Honor. Mr. Gradowski is still a fugitive, to the Government's knowledge.

THE COURT: So I am at a loss. How does Nash worry about or claim that he can attack any seizure from the automobile belonging to Gradowski?

MR. THAU: I think your Honor is addressing yourself to whether Mr. Nash has standing.

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THE COURT: That is the way we lawyers like to put it.

MR. THAU: Yes, of course. Now, I believe that on the case law, particularly Jones vs. U.S. --

THE COURT: I am familiar with Jones, but I long ago learned that, instead of resorting to great decisions, it is always more useful, first of all, to find out factually what is involved as you see it.

MR. THAU: Surely. Your Honor, Mr. Bush has turned over to me an enormous amount of material, which I assume he will offer in evidence against this defendant as probative, of course, of his alleged guilt in this case.

That being the case, it is my view of it that, to whatever extent we can reduce the amount of paper introduced against this defendant --

THE COURT: That would be a joy if we can, but again this is only in my opinion getting off the point I am concerned about. For example, let me see if I can -- If you take a look at the means paragraphs here in the first part of this indictment, you will see, for example, such allegations that it was part of the scheme that the defendants would obtain possession of certain blank checks of Vepco and Public Electric & Gas Company, and so on. Do you see that?

MR. THAU: Yes, sir.

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THE COURT: Perhaps there was a seizure here from the car ostensibly belonging to the defendant Gradowski, and there might have been some blank checks. Would that be a possibility?

MR. THAU: Yes.

THE COURT: That is the kind of information I am seeking to elicit. Can you help us, Mr. Bush? What is going on here, so I at least have some vague idea of the controversy which is always about the best you could expect, I learned, in these great litigations.

MR. BUSH: At this time, I would hand to opposing counsel and also to the Court an inventory of items which were seized from the car to which Mr. Thau has alluded.

In addition I am going to hand to the Court a memorandum of law pertaining to the suppression point.

THE COURT: All right. This is a copy of a 302 report, right?

MR. BUSH: That's correct, your Honor. It contains a complete inventory of the items which were seized from the car. Let me place into perspective what the Government plans to do with some of the items seized, or proposes to at the trial.

It is the Government's position that with respect to the items seized, none of them are items which the defendants

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are accused in the substantive Counts of the indictment with actually possessing in an illegal manner. I direct your attention to Counts 1 through 4 of the indictment, which set forth four specific checks, and it is the Government's position that none of those four checks are involved in this particular seizure.

It would appear from Item 1, and perhaps Items 2 and 3 on the inventory list, that those would be the checks, but in fact the checks that were seized from the car simply are extra blank checks, partially filled out or completely filled out, but ones which were not actually used, and which the Government does not intend to rely on as the actual items which came into the possession of the defendant Nash.

So what we are talking about then is evidence seized from the car which will go to prove the guilt of the defendant but not actually items, possessory items. It is the Government's position --

THE COURT: Now wait a minute. That last statement intrigues me. What do you mean by that?

MR. BUSH: I mean this --

THE COURT: I understand you that none of the inventoried list on this 302 Form of the FBI dated April 27, 1973 purport to be exactly the same things which are recited in Counts 1, 2, and including 4 of our indictment. That I under-

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stand and accept, but then you lose me. Do you want to offer any of these inventoried materials as against the defendant Nash?

MR. BUSH: Yes, the Government does plan to offer the majority of the material which appears on the list as evidence of the defendant Nash's guilt.

THE COURT: Then I am looking for something. According to what I read here is that this was a seizure of these materials from an automobile of Peter Gradowski, a 1968 Cadillac with a New York License Plate MO6442 parked on the property of one George and Mary Hammer.

Now, Mr. Thau has every reason as a practical matter from what you said to be concerned here, but I still don't get any claimed nexus between Nash and this seizure and the materials involved.

MR. BUSH: Well, the Government will link the materials involved up to the defendant Nash by means of fingerprints and also by means of showing that Nash and Gradowski were involved in a common scheme, the scheme which is set out in the indictment.

The Government does contend, however, that the defendant Nash has no standing to raise the suppression issue, and as I have cited in the memorandum of law which I just handed to the Court, the Government relies on the recent

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decision of the Supreme Court in Brown against United States, where that Court enunciated really a three-pronged test with respect to standing.

The first item which it enunciated was that a question of whether the defendant raising the suppression issue had a proprietary or possessory interest in the premises being searched. In this particular case defendant does not. The car was Gradowski's car.

Secondly, it asks the question whether the defendant was actually in the premises at the time, and I don't believe that there will be any evidence showing that he was.

Finally, it said that there would be no standing unless part of the crime involved was actual possession on the defendant's part of some of the items seized. In the case, as I stated at the outset, this is not the situation.

Therefore, the Government contends that there really is no standing on which the defendant Nash can make a motion to suppress.

I would note one typographical error on page 2 of the memorandum. I believe it states there that the car was seized from the premises of a relative of Gradowski. Actually, Mr. and Mrs. Hammer are Nash's relatives.

THE COURT: Offhand, I am having great difficulty in seeing any standing on the part of Nash; I will agree to

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that. You will have to enlighten me. Jones really doesn't help you much, Mr. Thau.

MR. THAU: Your Honor, I think that Jones gives us a definition of who may be an aggrieved person, and I think it's axiomatic that one aggrieved has standing. Certainly the man against whom this evidence is sought to be introduced, much to his ultimate detriment perhaps, or quite likely, is aggrieved if anyone ever was, in my view of it.

THE COURT: I think I better read Jones, but I don't really see that.

MR. THAU: I have a photocopy of it here, if your Honor pleases.

THE COURT: I'd like to. I also better read that Brown case, although I think I did read it in the advance sheets recently, but I'd like to reread it.

MR. BUSH: I have a copy of the Brown decision with me.

THE COURT: Mr. Thau, I take it that you would concede that your client makes no claim to possession or ownership of the automobile, that 1968 Cadillac?

MR. THAU: That's correct, your Honor.

THE COURT: He makes no specific proprietary or possessory claim to the land on which the car was parked, that of Mr. and Mrs. Hammer, I take it?

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MR. THAU: No, your Honor, but he does lay claim, for the purposes of this case, of course, since these goods are ascribed to him, he does lay claim to the goods themselves which were seized.

THE COURT: I see.

MR. THAU: That is, the evidence, I mean.

THE COURT: Well, I have really considerable doubt that this is the Jones case. Yet on the other hand it isn't squarely the Brown case either, because in Brown what was involved was stolen goods which had been apparently sold or delivered two months before the challenged search.

MR. BUSH: Perhaps I could just speak for a moment on that, your Honor. The indictment alleges that in fact, and the Government will prove that in fact the four checks which it is alleged they possessed, the defendant possessed and disposed of, were disposed of in December of 1972, and the search here came in April of 1973. To the Government's knowledge the defendants never had possession of or contact with those four specific checks following December of 1972.

MR. THAU: Your Honor, may I correct myself a little bit? In connection with a question asked by your Honor concerning whether this defendant lays claim to the vehicle, and I said categorically no perhaps a little too quickly, I think that the evidence, should there be a motion to suppress

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here, should your Honor grant standing, may well be on the part of the FBI agents that they learned that this defendant is the one who had caused the vehicle to be sent and parked on the property of his relatives; so while in fact he lays no claim to title in the vehicle, yet he lays a claim of being a bailee thereof, or one who did have some control over it.

THE COURT: Yes.

MR. THAU: So I would modify that.

THE COURT: I would assume that is really possible given the facts which apparently the Government and you agree on, and that is that the Hammers are relatives of Mr. Nash, so I could see plausibly what you are saying. Where that makes any difference as a legal matter I am unable to say, at least at this moment.

I tell you what I think we ought to do. There must be one agent who can pretty much lay this out. In other words, Mr. Bush, in the exercise of caution, I think I better hear a witness, but I want to inquire gently first, is there one such, or in your judgment would we have to have several to round out the picture of the seizure here?

MR. BUSH: I believe there is one agent who can cover the case fully. There is a second agent whose testimony would largely be cumulative of the first.

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THE COURT: I propose to go ahead and not rule on the standing question, which I think is extemely difficult, until I hear from the agent. Perhaps that would round out the picture sufficiently so I can make a ruling on standing.

But before we do that, I would like to consult with both of your gentlemen on a practical problem that I foresee here in terms of time at the side bar. Would you come up a moment?

[Discussion off the record at the side bar]

THE COURT: Now, gentlemen, unless you want to raise anything as to what I just discussed with you at the side bar, I propose we hear our witness, that is, the Bureau agent who would support the Government's position on any motion to suppress, with full understanding that I am reserving the standing issue as well as everything else. Anything before we call that witness?

MR. THAU: Not on the motion to suppress, your Honor. However, since we are waiting for the witness, concerning the trial proper I would ask that after such motion to suppress as there is is heard by your Honor, the trial proper not be commenced until next Monday, the 23rd.

Your Honor informed us informally that your Honor was assigned to the Court of Appeals, I believe, and that for various and sundry reasons it might look as though the

trial would be interrupted for two or perhaps as long as three days in the even that it started either today or tomorrow, and very frankly, I would prefer to start it next Monday if at all possible, in that I would prefer that there be no interruptions.

THE COURT: Yes, I understand. As I understand you, Mr. Bush, you are having difficulties with a number of lay witnesses whom you have had coming back from vacations, or you think you might have to bring back from vacations. Is that it?

MR. BUSH: The Government anticipates calling roughly ten or twelve witnesses, most of whom are not agents for any Governmental agency. I have had to bring back some witnesses from vacation, and I have asked several witnesses to postpone their vacations with the understanding hopefully that they would be able to leave the latter part of this week.

Of course, if they can't they can't, but under the conditions, I would prefer to go ahead because of the difficulty incumbent in gathering these witnesses together at a subsequent point.

THE COURT: In addition to the other problems that I indicated at the side bar, you will recall there is the problem of a member of my family who is very seriously ill,

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and the circumstances there are such that I would think that if she were to die, which I shudder to think about, that might create further problems of a personal nature to me.

Still further, however, I note that it was long ago offered to the parties to start this case earlier, but problems of Mr.Thau, as I recall it, were such that he was in an impossible position then and could not go forward due to other commitments. I mention the latter only because it is not entirely a surprise that we are beginning in a week where I have these other scheduled problems which I cannot avoid or change, so to put it mildly, we are sort of damned if we do or damned if we don't.

I propose that what we do is this: We hear a witness or two in the motion to suppress so that I can get a feel of the issues, most importantly, the so-called standing issue. We will then see what happens as a result of that, and then I will decide whether it would be better to start or better to postpone, as has been suggested this morning, till next Monday.

I might also note, to make the problems even more acute as to my or from the Court's viewpoint, at least, that I have two cases scheduled to go next Monday, one of which I think may be compromised by either a plea or, in the civil case, by a settlement; but I have no assurance that that is

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so.

So it is one problem after another, no matter what we do, but as I say, let's hear one thing at a time, and see what happens as a result of that, and then I will decide whether it seems better under these egregious circumstances to start today or postpone for a week.

All right, can we have the witness?

MR. BUSH: Yes, your Honor, just two very brief things. I would point out to the Court that I have Ellen Josephson sitting with me, who has been assigned to me for a portion of the summer, in any event, as a student assistant, and with the permission of the Court, would ask that she be allowed to sit with me during the course of the trial.

THE COURT: I don't think the defendants are going to object to that.

MR. THAU: Not at all, your Honor.

THE COURT: Miss Josephson, where do you go to law school?

MISS JOSEPHSON: University of Pennsylvania.

THE COURT: Very good.

MR. BUSH: In addition, I note Mr. Hammer in the courtroom, who I would anticipate possibly being called by the defense, and I would ask that any witnesses they might have in this issue be sequestered during the course of the

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suppression hearing.

MR. THAU: Very good. Mr. Hammer, would you please wait outside?

THE COURT: There are witness rooms right alongside the other side of this wall, Mr. Hammer.

[Mr. Hammer left the courtroom]

MR. BUSH: The Government would call Richard McMullen.

R I C H A R D Mc M U L L E N, called as a witness by the Government, being first duly sworn, testified as follows:

MR. THAU: Pardon me, your Honor, I think reciprocity may be in order here. I think Special Agent Morton, or is it Norton -- happens to be in the courtroom as well. I know he is a witness in this case.

MR. BUSH: He won't be a witness as the suppression hearing. If he wants him sequestered for the purposes of the suppression hearing --

THE COURT: Let's not get in an argument. If you represent to Mr. Thau and to me that he has nothing to say as to this seizure from the automobile, that I think is sufficient.

MR. BUSH: Ultimately he received the materials, but I am not sure that is going to be an issue at the suppression hearing.

THE COURT: I wouldn't think so either.

MR. THAU: On the other hand, if he should be a witness at the trial proper, it may be that some of the information he gathers from the witness presently on the witness stand might be of some assistance to him when he testifies on trial.

THE COURT: As long as you make an issue of it then, I will ask him to be excused.

MR. BUSH: I have no objection.

THE COURT: Agent Norton, would you mind waiting? Thank you.

DIRECT EXAMINATION

BY MR. BUSH:

Q Mr. McMullen, am I pronouncing your name right, to begin with?

A Yes.

Q By whom are you employed, sir?

A The FBI, Federal Bureau of Investigation.

Q What position do you hold with the FBI?

A Special Agent.

Q How long have you held that position?

A Eight years.

Q Directing your attention to the afternoon of April 13, 1973, would you state where you were and what you were doing?

A I was at 41 Beach Street, Sound Beach, Suffolk County, New York, assisting another special agent, Anthony Scuderi at an interview.

Q What is located at 41 Beach Street?

A 41 Beach Street is the address of the home of Mr. George and Mary Hammer.

Q Who are the Hammers, to your knowledge?

A To my knowledge Mrs. Mary Hammer is the sister to Richard Nash who at that time was a fugitive at the Federal Bureau of Investigation.

Q Where is Sound Beach located?

A Sound Beach is on the north shore of Long Island in the County of Suffolk.

Q Roughly how far is it from New York City?

A Approximately seventy-five to eighty miles.

Q To your knowledge how far would it be from the nearest Magistrate's office?

A I would say approximately thirty-five to forty miles.

Q What happened once you arrived at the Hammer house?

A That afternoon we arrived at the Hammer house, Agent Scuderi was driving. He pulled the car into the driveway, and upon pulling into the driveway we noticed a green Cadillac Convertible to the rear of the property.

We got out of the car, and we were approached by

Mr. George Hammer, who was accompanied by his dog, which he was holding on a leash or a choke chain.

We reintroduced ourselves to Mr. Hammer. We told him -- Agent Scuderi told Mr. Hammer that he would like to interview Mrs. Mary Hammer concering the whereabouts of her brother, and Mr. Hammer stated that he consulted an attorney and he didn't want to name the attorney, but he said that they had declined to be interviewed.

Somewhere along this line I interjected the question, I asked Mr. Hammer whose Cadillac that was to the rear of his property, and the only answer he gave me, he said, "Oh, it's just a friend's," and we returned to the topic of interviewing Mrs. Hammer and Mr. Hammer.

Mr. Scuderi asked Mr. Hammer if he could speak with Mrs. Hammer, and an agreement was reached. We walked to the back of the property, and Mrs. Hammer -- we were not invited inside the house -- Mrs. Hammer came to the rear door of the house, and opened the storm door and stuck her head out, and there was some conversation between Agent Scuderi and Mrs. Hammer under these circumstances.

At the conclusion of this conversation, we returned to the Bureau car, and I made a note of the license plate number of the Cadillac to the rear of the property. When we were in the Bureau car, and before we left the driveway, I attempted

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to call our radio station in New York City to get an identification of the registrant to that license plate number. I also attempted to call our Babylon office. We were out of range of both radio sets.

Q Let me interrupt you for just one moment. Had you ever been to the Hammer house before?

A Yes, I had. I had accompanied Agent Scuderi on February 6, I believe, 1973 at which time we interviewed Mr. George Hammer.

Q Was the car, the green Cadillac, there at that time?

A No, sir, it was not.

Q Let's take up with the story again. What happened after you attempted to raise your office on the radio?

A Being unsuccessful in raising the office, we drove to the 6th Precinct of the Suffolk County Police Department, which I believe is located in the town of Coram, New York, and we went into the Detective Squad, and I used the telephone in that squad room to call the Department of Motor Vehicles in Albany, New York, and ask for an identification of the license plate number which I had jotted down which was on the Cadillac.

The Albany Visual Section advised me that that car was registered to a Peter Gradowski, I believe, of an East 2nd Street address in New York City.

Upon receiving that information, it was our thought immediately that Mr. Gradowski was in that house. We advised the detectives of the Suffolk County Police Department about the situation, and they volunteered to come up along with us.

Two detectives accompanied us, and prior to leaving the police station, we requested that the sector car be placed on Beach Street so nobody could remove that car from the scene.

Q Let me interrupt you just for a moment again. At the time when this was occurring, was Mr. Gradowski a fugitive?

A Yes. We had advised the Suffolk County Detective Squad that Mr. Gradowski and Mr. Nash were fugitives, and that there was a possibility that either one of them or both of them may be at 41 Beach Street, Sound Beach, and in doing so, we requested that the sector car be sent to that residence immediately to prevent that car from leaving.

Q What happened then?

A We got in our Bureau car, and two detectives led. We followed a detective car via the shortest route from the Police Department to 41 Beach Street. Upon arriving, again we were met by Mr. Gradowski -- excuse me, I mean by Mr. Hammer.

I asked Mr. Hammer why didn't he tell me whose car that was when I asked him. He said well, he said, "I thought you knew whose car it was."

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I said, "Well, obviously I did not know whose car it was because I asked you who the owner was."

We then advised Mr. Hammer that we would like to conduct a search of the house for Gradowski or Nash. Mr. Hammer asked if we had a search warrant. He was advised by myself that in an instance where the individuals are fugitives from justice and we have probable cause to believe that they are in a location, we do not use a search warrant.

We were accompanied by Mr. Hammer. We went through the house.

THE COURT: Wait a minute. Excuse me. I am sorry. You explained this to George Hammer and what did he say?

THE WITNESS: Well, he said, "All right," he said, I assume that -- words to the effect, your Honor, that, "I assume that you know the law. I am not familiar with whether you need a search warrant or not." So he said okay.

So we asked him to show us through the house, which he did. He walked us through the bedrooms and the living room. We had to open a closet which was big enough to secrete an individual. He opened the closet for us. We went down into the basement, and we looked through the basement, and we didn't find either of the fugitives.

Upon returning to the kitchen area, we asked Mr. Hammer how he came into possession of the car, and he said

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that the evening before he had received a telephone call from a man who identified himself as Jack, and that Jack wanted to bring Mr. Hammer Mr. Gradowski's Cadillac, and Mr. Gradowski consented -- I mean Mr. Hammer consented to having the Cadillac brought to his property.

He said late that evening a man arrived driving a car. He parked the car to the rear of the property, came to the door, and gave Mr. Hammer the keys to Mr. Gradowski's Cadillac and he left.

We asked Mr. Hammer for a description of the individual, and he gave us a brief description, white male approximately forty years of age, first name Jack.

At this point I said to Mr. Hammer I would like to search the Cadillac, and he turned to his wife and said, "Get the keys." Mrs. Hammer got the keys of the Cadillac, gave them to Mr. Hammer. Mr. Hammer gave them to me, and I proceeded to search the Cadillac.

Q What was the appearance of the car immediately before the time you began your search as you could see it from outside the vehicle itself?

A From outside of the vehicle I observed that the Cadillac had been used to live in. In the back seat of the Cadillac was an unrolled sleeping bag which had obviously been slept in. There were parts of uneaten food on the floor

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of the Cadillac, part of a sandwich. There was half a cup of coffee, one of these foam cups that you would receive from a diner if you order a cup of coffee to take out. That was in the back seat on the floor.

There was a box containing papers and napkins from a stand, I belive, similar to McDonald's if it was not McDonalds. There was a partly eaten hamburger roll --

MR. THAU: Pardon me, your Honor. May we have a clarification on the time sequence involving those particular observations? Were those observations made prior to the search or after it?

THE WITNESS: When I went into the house, we did not approach the Cadillac to look into it until after I had received the keys to the car. I wasn't within twenty feet of that Cadillac at anytime prior to receiving the keys to the car.

Q Did you make those observations you just related prior to the time of your search or at the time of your search?

A Prior to search, prior to search.

Q Would you briefly describe the articles which you took from the car?

A The articles I took from the car were documents, paper documents which I had found in the car and in the trunk of the car, and I gathered them up and, not being well

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acquainted with the details of the case, I really didn't know what was really important.

When Agent Scuderi returned to the scene, I handed them to him.

THE COURT: Wait a minute, I am confused. Where had Scuderi gotten to? In other words, you had asked George for the keys. George turns to Mary and says, "Get the keys." She did so.

THE WITNESS: Okay. At that point, your Honor, the patrolmen from the Suffolk County Police Department took Mr. Scuderi aside and myself and said, "I know this fellow Gradowski. He has been in my sector." He said, "I even arrested him, I believe, a couple of months before." He said he's been known to stay in a house in the proximity of the Hammer home, another home. So Agent Scuderi said to me, "Look, you stay here and search the car. I will go with the patrolmen to the other house. Maybe Gradowski is there."

So he left with the patrolmen and the two detectives, and they went to look for Mr. Gradowski and Mr. Nash at this other location, and I conducted the search by myself, sir.

THE COURT: And had they left at the time you asked George in the kitchen for the permission to search the car?

THE WITNESS: No, sir. They were in the kitchen. As we all left the building I walked to the car, they walked

to their cars to go look at the other location for Nash and Gradowski.

THE COURT: When did Mr. Scuderi return to this scene?

THE WITNESS: He returned to the scene just as I completed the search of the trunk of the car.

Q At that point, what if anything happened between you and the Hammers?

A We told them that we are taking this stuff. I guess they were shown what we were taking. At this point Mr. Hammer said, "Look, I want you to take the keys of this car. I want you to take the car." He said, "I don't want anything to do with it. I am not involved with these individuals, and they have caused me enough trouble."

He said, "Here are the keys to the car, and I would like you to remove the car from my property."

Agent Scuderi took possession of the keys of the car and gave Mr. Hammer a receipt for them.

MR. BUSH: I would ask that this be marked for identification as Government's Exhibit 1.

xx [Government's Exhibit 1 marked for Identification]

Q Mr. McMullen, I show you what has been marked for Identification as Government's Exhibit 1 and ask you if you can identifiy that document?

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A. Yes, sir, this is the receipt that Agent Scuderi gave to Mr. Hammer for the keys to Mr. Gradowski's Cadillac.

Q I notice some writing on the bottom. Are you familia with that?

A Just very briefly, I know the keys were returned to Mr. George Hammer.

Q Roughly when?

A On April 27, 1973.

THE COURT: In other words, four days later?

MR. BUSH: No, this search occurred on April 13, your Honor.

THE WITNESS: Approximately two weeks later, your Honor.

THE COURT: Two weeks later, so that Mr. Scuderi returned the keys to the man.

THE WITNESS: Mr. Scuderi returned the keys to Mr. Hammer.

THE COURT: Can you explain what the circumstances were which led up to that?

THE WITNESS: No, sir, I can't. The original lead on this case was assigned to Agent Scuderi, and I was only accompanying him.

MR. BUSH: I would offer Government's Exhibit 1 into evidence.

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MR. THAU: No objection, your Honor.

[Government's Exhibit 1 for Identification received in Evidence]

Q To your knowledge, do you know what happened to the car following the date you were involved in the search of the premises?

A Yes, I do.

Q What happened to it?

A That car was removed from the Hammer property and brought to a home on Yaphank Road which was occupied by Mr. Gradwoski's mother.

Q Roughly when was this? When was the car removed?

A I couldn't give you a date. It was within a couple of weeks after we had gotten it from Mr. Hammer.

THE COURT: How was the car removed?

THE WITNESS: Driven, but at this point I don't know by whom.

Q By whom, if you know?

A I don't know now.

MR. BUSH: No further questions.

THE COURT: Do you want to ask any questions, Mr. Thau?

MR. THAU: Yes, your Honor. Your Honor, I believe that it might be incumbent upon the Government to introduce into evidence all the items listed in the 302 report since

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those are the subject of this motion to suppress.

THE COURT: I don't know that they have to introduce them into evidence.

MR. THAU: I offer them in evidence.

THE COURT: If you want to see them, I certainly agree with the latter.

MR. BUSH: Opposing counsel has been allowed to view the originals of the documents, and in addition he has been given copies of all the documents.

THE COURT: I see no reason why you have to offer these items in evidence at this hearing. The only concern I have is that defense counsel be allowed to see them, and apparently you have.

MR. THAU: Yes, I have, your Honor. There has been very full disclosure here.

CROSS-EXAMINATION

BY MR. THAU:

Q Mr. McMullen, you told us, did you not, that for all intents and purposes you were just accompanying your partner in charge, Mr. Scuderi; is that correct?

A Yes.

Q The seizure was made on April 25?

A April 13, I believe.

Q Prior to April 13 Had you worked on this case?

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A Yes.

Q How much time prior to the 13th had you been on the case?

A Several hours.

Q So that you came on the case on the 13th?

A No, no.

Q On the 12th?

A No, I was with Mr. Scuderi on February 6 when Mr. Hammer was interviewed at his residence.

Q Was that your first involvement in this case?

A Yes.

Q Did Scuderi on the 6th apprise you fully of the specifics of this case in terms of the nature of the charges, the investigation, the parties being sought and being investigated?

A Well, he advised me of the parties being sought. I viewed photographs of the fugitives very briefly. I was filled in as to their scheme, you know to defraud money, and so forth, and that there were warrants issued outstanding for these men.

Q Were you apprised by name of such banks as were involved here?

A No.

Q For all you knew, it might have been the First

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National City Bank, Manufacturers Hanover; you didn't know what the banks were?

A Could have been, right. I didn't know specifically what the banks were.

Q You did know banks were involved?

A I did know banks were involved, yes.

Q On the first visit to the Hammer home on the 6th, you spoke to Mr. and Mrs. Hammer or just to Mr. Hammer?

A Just to Mr. Hammer.

MR. BUSH: Objection as to relevancy as pertains to the visit on the 6th.

THE COURT: I am inclined to agree as a practical matter. I don't understand what this is all about.

MR. THAU: It will all come in.

THE COURT: Let's go ahead. You don't intend to dwell long on the 6th, I hope.

MR. THAU: No, your Honor.

Q Mr. McMullen, between your two visits to the Hammer home, did you have occasion to discuss this case with witnesses in this case?

A No.

Q Bank officials?

A No.

Q Did you have occasion to inspect such records, FBI

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or bank records as might have existed on the case?

A No.

MR. BUSH: Objection as to relevancy again as to what --

MR. THAU: As to probable cause, your Honor.

THE COURT: Yes. He is entitled to inquire about that, the point being he wants to argue that at that time there was no justification to seize the contents of the trunk as were seized as being either the tools of the crime or evidence of the crime. Right?

MR. THAU: That's correct, your Honor.

THE COURT: All right.

Q Mr. McMullen, how long was the interview on the 6th?

A I would estimate thirty minutes to forty-five minutes.

Q Did you take notes on that occasion?

A No, I did not.

Q Did your partner, Mr. Scuderi?

A Yes, he did.

Q Have you with you the notes he took on the 6th of the interview with the Hammers?

A No, I don't have the specific notes that he took on that date.

Q Did you take notes on the 13th?

A No, I did not.

Q Did Mr. Scuderi?

A Yes, sir, he did.

Q Did you cause a report to be filed concerning your activity at the Hammer home on the 13th?

A Yes, we did.

Q Have you with you that report?

MR. BUSH: I would object as to use of the records. 3500 material I don't believe opposing counsel is entitled to the report at this time.

THE COURT: That may well be, but first of all, I take it you didn't make the report, Agent Scuderi did; is that right?

THE WITNESS: Yes, sir, he took notes and dictated whatever papers that would be considered a report.

THE COURT: All right.

THE WITNESS: I reviewed the report and concurred with its contents.

Q Had you not agreed with any of its contents, would you have been invited or welcome to make amendments or changes in that report offered by Scuderi?

A Absolutely.

Q So that for all intents and purposes, since you approved of it after reviewing it, it is your report as well

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as his?

A Yes, it is.

MR. THAU: Your Honor, at this time, although the report may be 3500 material, I call for its production in that it may contain prior inconsistent statements, and on that basis I think counsel has a right to see it though we are not now in the trial proper.

THE COURT: Well, I am not going to require that it be produced at this moment because if, as, and when this material is ever offered at the trial, why then the reports, of course, will be available. However, I would like to see the report, if I may.

MR. BUSH: I believe the witness has a copy.

THE COURT: You don't have an extra?

THE WITNESS: You can take this, your Honor.

THE COURT: Can I borrow that?

MR. BUSH: I have a copy as well.

THE COURT: I shan't be long. I would just like to take a look at it.

I am doing this for two reasons, so the record is clear. One, I do agree with the Government that this kind of material should not, necessarily at least under Section 3500, be turned over at this point, but on the other hand, since I am concerned about the issue of standing, I want to see this

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material.

Second of all, if there is some reason in the interest of justice that this material, notwithstanding there is no statutory command therefor, ought to be turned over, I would like to be in a position of granting the request of defense counsel now.

Is there any other cross for the moment that you have?

MR. THAU: Yes, your Honor.

THE COURT: Why don't we get to it?

MR. THAU: Thank you.

Q Now, Agent, the report his Honor is now examining has been sitting in front of you in the course of your testimony this morning, has it not?

A Yes.

Q Have you referred to it to refresh your recollection concerning the events of the 13th?

A While I was sitting here?

Q Yes.

A No.

Q Have you not been flipping its pages as you have been sitting here and gazing upon it?

A No, no, not the portion that -- What I was gazing at had to do with the receipt for the keys.

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Q Prior to taking the stand this morning, did you at all refresh your recollection with the aid of the report his Honor is now studying?

A No, not prior to this morning, no.

Q This morning?

A This morning, yes.

Q This morning you did?

A Yes.

Q Refresh your recollection with it?

A Yes.

MR. THAU: Your Honor, another ground on which I think the report ought to be produced is anything with which a witness has or is refreshing his recollection is available for examination.

THE COURT: I give you high marks for that additional approach, but I still maintain that is no such cause now. We are trying to get at the bottom of an issue which has nothing to do directly with the trial itself, and I have said all I am going to say except to add that now that I have read the material, I see no reason at all to turn it over to defense counsel, and when I say that, I mean this latest additional reason which you just broached.

Q Agent, you testified a moment ago that this nearest Magistrate was some thirty-five or forty miles away; is that

correct?

A Yes, I believe that's correct.

Q And I suspect that you stated that to illustrate to his Honor how difficult and cumbersome it would have been to secure a search warrant; is that so?

MR. BUSH: Objection, irrelevant.

THE COURT: Well, that is the conclusion I drew, so I don't know why we will say it is irrelevant. In any event, the point was long ago clear to me, so let's not belabor it and I will let it stand.

Q You secured the assistance of the State Police in this investigation, did you not?

A County Police.

Q When speaking of the Magistrates and thirty-five or forty miles away, you were speaking of a Federal Magistrate, were you not?

A Yes.

Q You knew then, did you not, that there were persons authorized to issue search warrants under State Law much closer than thirty-five or forty miles away, didn't you?

A The thought never came to my mind.

Q It did not?

A No.

Q Was there any discussion as between yourself, your

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partner, and the other law enforcement officials whom you enlisted about seeking a search warrant?

A No.

Q The thought never came to your mind then either, right?

A No, because we were seeking the assistance of the Suffolk County Police to apprehend two fugitives, not to conduct any State investigation. We asked for their assistance because we were looking for two fugitives, and there were not only two fugitives we were looking for, but if we had to go into that house and they were -- the fugitives were in that house, we would also have to contend with Mr. and Mrs. Hammer, so we had four people against two agents, and we wanted the assistance of the County Police.

Q Are you aware, sir, that Federal authorities may and indeed are highly advised to get search warrants from State officials when Federal ones are either unavailable or --

MR. BUSH: I object to the form of the question.

THE COURT: In any event I think the question has already been answered. The thought never occurred to him, and that leaves us only with the question of law, which I am at least as well equipped to field as is Agent McMullen, so let's drop it on that ground too.

Q May we therefore note at that time, Agent, that no

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warrant was obtained here not because the closest Magistrate was very far away, but in fact because no one thought of getting any warrant?

A I really can't answer that because I can't answer as to what Mr. Scuderi was thinking.

Q The point is that you didn't think of it.

A No, I didn't.

Q So that had one been located literally down the street, it wouldn't have made any difference in this case as far as you are concerned?

A No, I can't say that either.

Q You then would have thought of it?

A We were forty miles away from the nearest U.S. Court that could possibly have issued a warrant.

Q Agent, were you then aware that State crimes had also been committed or allegedly committed?

A No, I was not aware that they were State crimes. I would assume if there is a Federal violation, there is usually also a State Statute that it's in violation of.

Q You were aware, were you not, that there were such things as County Courts?

A Of course.

THE COURT: Let's not argue that matter. I am prepared to take judicial notice of where the courts are,

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State and Local variety.

Q When you arrived at the Hammer house, you drove right up onto the property?

A The first or second time?

Q Second time.

A Right onto the property, right, to block the driveway so that the Cadillac couldn't move.

Q Right off the bat, before you ascertained to whom that car belonged?

A Oh, when we first arrived?

Q The first time, the second day.

A Yes, sir. All right, the first time the second day.

Q On Thursday.

A We pulled into that driveway, yes.

Q Unannouced?

A Yes, unannounced.

Q And at that time it was you and Scuderi?

A Yes.

Q And Hammer, as I recall, told you right off the bat that he and his wife had consulted with counsel and did not wish to be interviewed; is that correct?

A Yes.

Q You persisted in your attempts to interview them in spite of that; is that right?

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A Yes.

Q I believe you said that you inquired of them who the attorney was, and they wouldn't give you his name or didn't?

A We inquired of Mr. Hammer, and he declined to furnish his identity.

Q Is the name Stanley Cohen familiar to you, sir?

A No, it is not. I will rephrase that, that name is familiar to me as being the name of an attorney, but not associated with this case.

Q Not associated in this case?

A No, I know the name, but not associated with this case.

Q Do you not know him in fact to be a prime suspect in this case?

A No, I do not know.

Q You do not know that Mr. Cohen was called as a prospective defendant before the Grand Jury in this very case?

A No, I do not.

MR. BUSH: I would object to any further questions in this line.

THE COURT: I agree. We have covered this.

MR. BUSH: What Mr.Thau knows of his own knowledge is totally irrelevant.

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THE COURT: I agree. We are wasting a lot of time, gentlemen. I just said don't argue.

MR. THAU: I am getting to the meat of it.

THE COURT: Go ahead. Go on to something else please.

MR. THAU: Yes.

Q Now, Agent, did you begin to suspect that Mr. Nash and Mr. Gradowski were in that house before you ascertained the ownership of the car or only after you called Albany?

A Before.

Q But you did not ask to search the house before; is that correct?

A Right.

Q And your basis for suspecting that these two were in the house was that the Hammers were relatives of Nash?

A And the Cadillac was on the property.

Q Up to that point you didn't know to whom it belonged; is that right?

A Well, I did not know specifically to whom that Cadillac belonged. I would say that upon arriving, seeing a strange car in a driveway, a car that had not been seen there before, to my knowledge, I would assume that anyone could have been in the house, and that quite possibly Nash or Gradowski could have been in that house.

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Q I assume from what you said that there was long-standing surveillance of the Hammer household in the course of which lists were made of such cars as were seen on the Hammer property?

A No, that is not correct. There were no longstanding surveillances of that property.

Q Short standing surveillances?

A No, no.

Q If my own personal car, FBI agent, had been on the Hammer property, would that in your mind have given you cause to believe that either Nash, Gradowski, or both were hiding in the premises?

A I would say --

Q Assuming that you had never seen my car.

A I would say that, but I would amplify this by saying it is very unusual in a fugitive investigation for a person such as Mr. Hammer, who claims not to have been involved in this -- in the activities of the subjects of the case -- to not be cooperative in this matter, and his actions in consulting an attorney and declining to be interviewed certainly aroused my suspicions as to his cooperative --

Q So you were suspicious?

A Yes, I was, yes, and I was suspicious when I saw a car in the driveway.

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Q Not belonging to him?

A Not belonging to him.

Q How did you know it wasn't his Cadillac, Hammer's?

A Well, I asked him whose car it was, and he said a friend.

Q Up to that point, you had no way of knowing whether it was his or not, Hammer's?

A Up to that point I asked.

Q It was then that you left the property, after a futile attempt to trace the ownership of the car; is that right?

A Yes.

Q Up to that point you hadn't found the half eaten sandwiches and apricots and so on?

A That's correct.

Q You called Albany, you got your answer, and it is at that point that you enlisted the State Police, the County Police?

A Yes.

Q You came back on the property blocking its exit?

A Yes.

Q Were these other gentlemen, the State authorities armed?

A Yes, they were detectives.

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Q You told us a moment ago that you were now dealing with the possibility of two fugitives if the fugitives were in the house, four people against two; is that correct?

A Yes.

Q So you were bringing these people for protection as well as investigation, right?

A For protection only.

Q For protection only. When you came upon the property the second time on the 13th, were any of you four holding your weapons in your hands?

A No.

Q Neither yourself nor your partner nor the State Police?

A No. As far as I know, no.

Q You don't know for sure?

A Well, the four detectives, the four of us, two detectives and the agents, went into the house. I didn't see any weapons in any of their hands.

Q And you told them, "We'd like to search the house;" is that right?

A Yes.

Q Is it your view of the Law of Search and Seizure, Agent, that you gave Mr. Hammer a correct reading of the authority you had when you told them --

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MR. BUSH: Objection as to relevancy.

THE COURT: I am going to sustain the objection. This is a legal argument which, incidentally, to put it to rest, I don't know that there was valid consent for the search of this house at all, but let's not argue that. We are not concerned with that here except in one indirect sense which I have in mind, and if I am not bored to death by the end of all this, I will rule on it, but don't argue law with Mr. McMullen. He is not here for that.

MR. THAU: Pardon me, your Honor, so that I might get some guidance here --

THE COURT: I have already ruled that, if standing alone, there was no valid consent by the Hammers to the search of their home.

MR. THAU: How about the car?

THE COURT: No, that is a different question entirely. Come on, let's move along. This is flowing like cold glue.

Q Did you tell Hammer upon your return that you had ascertained that the car belonged to Gradowski?

A Yes.

Q Did Hammer acknowledge that it belonged to Gradowski?

A Yes. Well, upon my return I said to Mr. Hammer, "Why didn't you tell me that this is Mr. Gradowski's car?" And Hammer says,"I thought you knew it was Gradowski's car."

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witness in this proceeding.

Q Did you ask him whether Gradowski or whoever Gradowski had lent the car to perhaps had given Hammer permission to let anyone search the car and seize anything from it?

A No, I did not.

Q Did you ask Hammer whether he had a registration for the vehicle?

A No, I did not.

Q Did there ever in the course of that day come to your attention the fact that this defendant, Richard Nash, was at all instrumental in causing that car to be placed on the Hammer property?

A No, it did not.

Q And the keys were handed to you; is that right?

A Yes, they were.

Q This is when you four law enforcement officials were in the house, in the kitchen I believe you said?

A Yes.

Q Is it at that point that Scuderi and the two officers left to check the house where Gradowski maybe might be located?

A Well, we all were leaving the kitchen at that time, leaving the house after a search in that case. It was at that time that Agent Scuderi, the two detectives and the patrolman left to go to the other house.

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Q During your search of the house, were any personal properties displaced to look under the beds or the mattresses or inside the closets?

A I don't believe so, no.

Q It was a very neat search?

A Yes, it was a walk-through.

Q You went from top to bottom of the house?

A Yes. We went -- stayed on the main floor. I don't believe -- I don't know if there is an upstairs, and we went down to the basement.

Q Was there any conversation between yourself and Scuderi after the search of the house concerning what it is that ought to be seized from the car?

A None, no.

Q Were you at all aware prior to going to the car what it was in the car that you might find?

A Well, I was looking for information which would lead me to the two fugitives, yes.

Q To their location?

A Yes.

Q So you were propecting, so to speak?

A If you want to use that term, I guess so, yes.

Q You had gotten no information whatever from any of your sources that in that car would be found physical evidence

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related to the crimes charged here?

A No, I had gotten no information that I would find physical evidence relating to the crime, no.

Q So that had you in fact gone to a Magistrate, you could never have arranged an affidavit seeking a search warrant

MR. BUSH: Objection as to relevancy.

MR. THAU: May I finish a question before an objectio is made?

MR. BUSH: I would interpose the objection when it's clear what the question is.

THE COURT: Come on, gentlemen, please. This is painful enough without you both talking at once. Go ahead and finish the question.

MR. THAU: Thank you.

Q So that, Mr. McMullen, had you taken yourself to a Magistrate to obtain a search warrant, you would not then have been in a position to assert in an affidavit that you had probable cause to know that in that car would be contraband or evidence of the crimes charged; is that right?

MR. BUSH: I renew my objection to it. It calls for a legal conclusion, and also on the grounds that it's irrelevant.

THE COURT: I am going to sustain it on the first basis. Please, Mr. Thau, I would rather you argued your legal

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points to me, and if I may say so, I have anticipated so far each and every one of these slashing points, and I wish you would not put them to Mr. McMullen who is here as a witness. He may know a lot more about this than you and I do, but I don't think he is the right person for these arguments.

Q You opened the trunk?

A Yes, I did.

Q Was the trunk all full of stuff including what is listed on the schedule here, or was that the only thing in the trunk?

A There was a lot of stuff in the trunk.

Q So that you sifted through and picked that out?

A Well, as what I say, there was a lot of stuff in the trunk, there was a spare tire in the trunk. I think there were articles of clothing in the trunk. There may have been part of the cover for a convertible top in the trunk, a jack, and some stuff, a bunch of papers. I just gathered up all the papers in the trunk.

Q You gathered them up?

A Right.

Q And there came a time some twelve days later on April 25 when Norton, your partner, Mr. Norton examined the contents; is that right?

A I believe so, yes.

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Q Among the items which Norton examined, were there any other than the ones listed on the schedule 302 and which were discarded as far as this case is concerned as irrelevant to it?

A I can't say that precisely because --

Q Would you look at it?

A I didn't make a specific inventory of every piece of paper that was in the trunk.

Q I ask you to look at the 302 schedule given to us by Mr. Bush, and ask you whether what is listed there comprises the entire booty from that trunk on that car or whether it's only part of it?

A I can't answer that question because I didn't make a specific inventory of every piece of paper I took out of the trunk.

Q Did anyone?

A I don't recall if there was one made. The papers that were taken from the trunk were put in an envelope. I turned it over to Agent Scuderi.

Q Have you any recollection or knowledge whether any of what you seized can be ascertained to be the property of Richard Nash?

A No, I cannot answer it.

MR. THAU: I will be finished in a minute, your Honor.

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May I have a short second?

THE COURT: While he is going through his notes, Mr. McMullen, you have already told us you were not the case agent on this particular case, that Scuderi really was, but in general did you know the nature of the possible criminal case to be made against Nash and Gradowski? Did you have any general idea as to what Scuderi was working on?

THE WITNESS: Well, the case, your Honor, was assigned to an agent in the New York City office, Lee Norton. He sent out a lead to the Babylon resident agent of the FBI to interview the Hammers concerning the whereabouts on the fugitives. That is what we went out there to do.

THE COURT: Right.

THE WITNESS: Not to investigate the activities of these individuals relating to the crime, but to look for them as fugitives.

Q And that is all, so that you don't know what the underlying accusations may have been?

A I know generally that it was involving some sort of embezzlement of bank funds.

Q Did you know that?

A Yes, yes.

Q You knew that there was something to do with banks?

A Just that it was a matter that Scuderi handled.

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Scuderi is an accountant, and he handles those types of investigations relating to accounting matters and banks, so I knew generally from the character of the case that it was assigned a 29-number which indicated to me that it had to do something with bank fraud.

THE COURT: I was about to ask you that.

THE WITNESS: Yes, I knew that.

THE COURT: When you opened up that trunk, did you have occasion to see the nature of any of the documents or their apparent nature as they appeared?

THE WITNESS: To the best of my recollection, the documents that were so important to me when I opened the trunk were documents pertaining as to the location of the fugitives. I found a repair order for their car that the car had been repaired, I believe, in Los Vegas, Nevada, a couple of weeks before. I thought that was interesting as to a possible lead as to where they were and where they may have been.

The other material I didn't pay attention to other than I was looking for specific locations. I just threw them in the envelope.

THE COURT: Without checking any notes or anything, do you recollect seeing anything at the time which purported to be documents emanating from a bank, either in the sense

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of internal bank records or the kind of bank records that individual depositors would have at a bank?

THE WITNESS: No, I can only say I don't recollect seeing those documents at the time.

THE COURT: Thank you. Anything else, Mr.Thau?

MR. THAU: Just one question.

Q Were the documents listed on the schedule here inside an envelope?

A Yes.

THE COURT: All in the one envelope?

THE WITNESS: Well, there were a few that were scattered around, and there was an envelope with a lot of documents in it that, you know, I thumbed through, and threw them back in.

THE COURT: When you say an envelope, do you mean a legal size envelope?

THE WITNESS: Yes, sir, that envelope on the table right there.

MR. BUSH: You mean a manila folder? This is the envelope to which reference has been made.

THE COURT: Yes, I call that a manila folder.

MR. BUSH: Well, it's a red legal type of envelope.

THE COURT: File jacket size.

MR. BUSH: File jacket size, correct, your Honor.

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THE COURT: All right.

Q You took the file to ascertain from its contents whether those contents might give you any leads as to the whereabouts of the two suspects?

A What I did was I gathered them up, and when Agent Scuderi rearrived on the scene, I said to him, "Here, Tony," I said, "You may want to look through this. They may have some stuff you are looking for."

Q But your personal purpose and intent in taking it was to ascertain or to have anyone in your agency ascertain whether its contents might provide any leads as to the whereabouts of the two suspects?

A Yes.

MR. THAU: Thank you.

THE COURT: Let me indicate that I am going to ask the Clerk to mark as Government's Exhibit 2 for identification only the 302 report dated April 19, 1973. When I give that date, that is the so-called date of the transcription up at the top. As I have said, I see no reason in law or common sense to turn these over to defense counsel now, so the record is complete on that. Those ought to go back to Agent McMullen, I believe.

Thank you, Agent McMullen.

[Witness excused]

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THE COURT: Now, as I say, I would conclude on what has already been said, and assume there was a requisite standing and so on, to find and determine that the so-called consent to the search of the Hammer home was not a legitimate or valid consent as the law recognizes the same, but to me that doesn't answer the problem of standing, nor does it answer what I consider to be a separate question, although I can see the argument that perhaps if this was an illegal search of the home, that might affect the later search of the car. I don't want to ignore that, but that is not what I am really trying to get at. I would like to hear from Scuderi, at least briefly. He apparently had a conversation or conversations with Mary Hammer which McMullen couldn't give us because he didn't hear them.

Also, Scuderi was the man who was really the agent in control of the situation, more so than was McMullen on the critical day in question, April 13.

So if you don't mind, to round out the picture, Mr. Bush, I would like to briefly examine Mr. Scuderi, and then allow Roland Thau to cross-examine him, and then I will make a determination on the standing and any other issues that need be.

By the way, it seems to me that the proper thing to do here is if, let's assume this Court had determined that

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Mr. Nash doesn't have standing, as we lawyers call it, I think I ought to go further and alternatively rule on what might be the legitimacy of the search of the car, assuming he does have the standing, so in case there is an appeal, we won't have to go back and go through all this again, you see.

MR. BUSH: Very well, your Honor. The Government would call Anthony Scuderi.

MR. NASH: Excuse me, your Honor, I would like to talk to my lawyer a minute, please.

THE COURT: No reason why you can't. Go right ahead.

MR. NASH: I know, but he is telling me to shut up, I can't talk.

MR. THAU: I don't think it's exactly in those terms. I think, your Honor, realizes, when a witness is on the stand, it's of the utmost importance that counsel listen carefully.

MR. NASH: And we are getting another witness, and I still can't say anything.

THE COURT: You certainly can say anything, because it will take a few minutes for the witness.

MR. NASH: This is why I told you I want you to be in on anything you ask George or anybody else.

I want a different lawyer.

THE COURT: Just a moment, Mr. Nash.

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MR. NASH: He is telling me I am asking him to suborn perjury. I don't know what the hell he is talking about.

THE COURT: I don't ask you to tell me what he is talking to you about. Keep your temper. These things are difficult enough without adding difficulties that you don't need. I have no basis to intervene in any private conversations between you and your lawyer.

Be patient. Nothing is going on that need create all this.

I happen to know that your lawyer is a capable and experienced man, and who knows, he may not have been the greatest lawyer in the history of this country, but he certainly is by no means the worst of this or any other generation.

We go from one captious interruption to the next in this poor little room. You sit down. Your lawyer knows the law. I don't have any reason to know that you know the law. Maybe you are a lawyer, for all I know, but I don't know that. Are you a lawyer?

MR. NASH: No, sir.

THE COURT: Be patient with him. He is trying to help you. I can assure you that he tries very hard and often with considerable success, even before this particular Judge in this large court, which has many Judges.

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So I ask you, just as man to man, to think about that. He doesn't do things lightly, I know that. Maybe you don't agree with him. Most clients don't agree with their lawyers, sometimes to their peril.

So be patient. The thing I want to know is, however have you had an opportunity to say whatever it is you want to say to him?

MR. NASH: I don't wish to say anything.

THE COURT: What?

MR. NASH: I don't wish to say anything. I changed my mind.

THE COURT: All right, you changed your mind. Now we have another witness, whever he may be.

MR. BUSH: He should be in the same room as was Mr. McMullen.

THE COURT: Let me make an observation to you and Mr. Nash most importantly, but perhaps to an extent to the Assistant, Mr. Bush. I would invite the defendant, whom you tell me, Mr. Thau, claims a possessory interest of some kind in this material which was seized from the trunk, to consider whether or not, given the decision of United States against Jones, and then even perhaps to carry it further, to the April decision entitled United States against Brown, as to whether or not he would like to get on the stand and testify

as to that interest, such as it may be.

MR. THAU: I will discuss that with him, definitely.

THE COURT: Would you?

MR. THAU: Yes.

THE COURT: I think it ought to be, in view of what happened in Jones, and I know I don't need to tell you what happened in Jones. I also might remind you of what is known as Footnote Four in the Brown Opinion of April of this year, and if you do not have a copy of that Opinion, you ought to look at it.

MR. THAU: Yes, I have read the decision, but I can't think of Footnote Four.

THE COURT: May I offer you the copy which Mr. Bush was good enough to loan me.

MR. THAU: Thank you.

THE COURT: Footnote Four I think ought to be considered. We will take a recess in our hearing.

[Recess]

ANTHONY SCUDERI, called as a witness by the Government, being first duly sworn, testified as follows:

MR. BUSH: Again, I would ask for Mr. Hammer to be excluded from the courtroom.

MR. THAU: Your Honor, Mr. Hammer is not to be a

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witness in this proceeding.

THE COURT: Will that suffice, in your judgment, Mr. Bush?

MR. BUSH: Excuse me, your Honor?

THE COURT: Will that suffice to allay your concerns?

MR. BUSH: Yes, it would, your Honor.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. BUSH:

Q By whom are you employed, Mr. Scuderi?

A By the Federal Bureau of Investigation.

Q What position do you hold with the FBI?

A Special Agent.

Q How long have you been a special agent?

A Twenty-two and a half years.

Q Directing your attention to April the 13th of this year, in the afternoon of that day, would you tell the Court where you were and what you were engaged in doing?

A I was located in the area known as Sound Beach, New York, at 41 Beach Street in the company of Agent Richard McMullen conducting an investigation to locate and apprehend two fugitives by the name of Peter Gradowski and Richard Nash.

Q What was located at 41 Beach Street?

A That is the residence of Mr. and Mrs. George Hammer.

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Q Following the time you arrived at that residence, would you tell the Court what you did and what happened?

A Upon entering the driveway of the Hammer residence, we alighted from the car and proceeded up toward Mr. Hammer, who came out of his home, and we approached him, identified ourselves, and at the same time told him of the purpose of our visit.

It was in connection with locating and apprehending fugitives Nash and Gradowski, and whether he had made his decision as to whether to discuss their whereabouts with me and Agent McMullen, and also I told him that I wanted to speak with Mrs. Hammer, who was not present on the outside of the home.

At this time Mr. Hammer was asked about a 1968 Cadillac that was parked to the rear of his property, and he replied that it belonged to a friend.

Moments later Mrs. Hammer stuck her head out the back door of her home. I identified myself. I told her the same thing I told Mr. Hammer, that I wanted to talk to her about her brother, Mr. Nash, and both Mr. Hammer and Mrs. Hammer said that on advice of counsel they declined to discuss the matter. I asked them who counsel was, and they declined to give me the attorney's identity.

Thereupon we went back to our car, which was parked in

the driveway, and as we were leaving, Agent McMullen took note of the license plate of the 1968 Cadillac.

He tried to get a response from our car radio with the New York office and with the Babylon resident agency where I am stationed, and we were unsuccessful.

We decided to drive to the nearest Precinct, which was about four miles away, which was the 6th Precinct of the Suffolk County Police Department.

Agent McMullen made a telephone call to the New York State Motor Vehicle Bureau, and determined that the license plate on the Cadillac was registered to Peter Gradowski.

We made these findings known to detectives at the Suffolk County Police Department and asked for possible assistance in the event the fugitives might be located at the Hammer residence.

We then proceeded back to the Hammer residence, and upon entering the driveway Mr. Hammer was approached again, and I believe Agent McMullen asked him about the car, who it belonged to, and he didn't give us a quick answer to that question, and we told him that it was the vehicle -- we determined it was the vehicle of Peter Gradowski.

And he said that he thought -- he assumed that we would know, that's why he did not tell us.

Thereupon, we asked him to enter the house to determine

whether the fugitives were located in the residence, and he said that -- he asked us if we had a search warrant, and we said we did not, and that we wanted to determine whether the fugitives were actually in the house, which was the reason for going into his residence.

He allowed us to go into the residence, and he accompanied us -- accompanied both Agent McMullen and myself in the various rooms, and we satisfied ourselves that the fugitives were not there.

We came back outside, and before leaving the house Agent McMullen asked Mr. Hammer's permission to search the car, and for the keys to the car, at which time Mr. Hammer, as best I can recall, may have asked Mrs. Hammer for the keys, which she provided, and Mr. Hammer then gave the keys to Agent McMullen, who then proceeded to the 1968 Cadillac.

At this moment one of the officers of the Suffolk County Police Department made mention of the fact that Gradowski might be located at another area nearby, which was a few minutes away, and I told Agent McMullen that I would accompany the police officers to this new location, which I did do, and returned to the Hammer residence very shortly thereafter, about ten or fifteen minutes at the most.

At this point Agent McMullen had just about completed his search. He was looking in the trunk. He had taken out

papers contained in a red manila envelope with tie strings, and he noted that many of the papers were hotel bills and repair bills.

I looked in the car and --

Q Let me interrupt you just a moment there. Were you the case agent in charge with respect to this matter?

A I was.

Q What items were you interested in discovering, if any, inside the car which was being searched?

A Any items that would give us leads to locate and apprehend the fugitives.

Q Were you interested in addition as to items relating to the commission of the crime that apparently occurred?

MR. THAU: Objection, your Honor. It's not only leading --

THE COURT: I agree. That is sufficient. Particularly in view of the last question, I don't think you should ask that that way.

Q Were you interested in any other items as well?

MR. THAU: Judge, in light of the last question, your Honor, which taints this one, this is still leading, and in addition it's seeking to impeach this witness who was catagorical on the issue of what his purposes were, which was leads as to his whereabouts.

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THE COURT: I will permit whether or not he had any other purpose, but that is all.

A Not directly, no, sir.

MR. THAU: I withdraw my objection.

Q What if anything did the Hammers say to you concerning how the car came to be on the premises?

A On the second time we reappeared, Mr. Hammer stated that the night, previous night, late in the evening an individual had called about leaving the car, and that shortly thereafter this individual, who may have identified himself as Jack possibly, no last name, dropped the car off and left the keys with Mr. and Mrs. Hammer, and no full description or identity could be provided.

Q After the time when the search of the car was completed, what did you do and what happened?

A After the search was completed, we left the residence and returned to the Babylon office.

Q What if anything was done with respect --

A Before leaving Mr. Hammer requested that I take the keys to the vehicle, and I complied with his request and gave him a receipt for the keys and took the keys with me.

Q I show you what has been introduced into evidence as Government's Exhibit 1, and ask you if you can identify that document.

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A Yes, I can.

Q What is it?

A This is a receipt dated April 13, 1973 that I gave to Mr. Hammer, and I signed my name, for the keys to the 1968 convertible green Cadillac bearing New York License Plate No.MO6424 which is the vehicle owned by Peter Gradowski.

MR. BUSH: I have no further questions.

THE COURT: Mr. Scuderi, I notice on that receipt which you were just shown, Government's Exhibit 1 for purposes of this hearing, that you apparently had occasion to return the keys to Mr. George Hammer on April 27, some two weeks later.

THE WITNESS: Yes, sir.

THE COURT: Could you explain the circumstances under which that was done?

THE WITNESS: Yes, sir. Subsequently, subsequent to April 13th Mr. Hammer called and/or I called him, and he said he wanted that car off his property, and arrangements had to be made to take the car away, either I took it or other arrangements had to be made.

And I told him I would check into it to see if we could take possession of it, which I doubted.

So the keys were returned on that date as indicated on the bottom of the receipt to Mr. Hammer who was to -- as

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last known to me, as told to me by Mr. Hammer that he was going to move the car off his property, and the receipt was returned to me that I originally gave him, and on the lower portion of the receipt I noted, I made a notation that the keys had been returned.

THE COURT: So that in other words, on April 27 at George Hammer's request you took the keys back to him?

THE WITNESS: Yes, sir.

THE COURT: Was that for a purpose of his so that he could arrange to have the car moved as he saw fit?

THE WITNESS: Yes, sir.

THE COURT: And you told him that the Bureau would not take custody of the car?

THE WITNESS: Yes, sir.

THE COURT: Perhaps I misunderstood Agent McMullen, but I believe he said this morning that he recalled something to the effect that there was a time in April where the car was moved, I thought he said by agents, I don't know whom, to some address nearby, Yaphank.

THE WITNESS: That was moved to Yaphank Road in Sound Beach by Mr. Hammer.

THE COURT: When, do you know?

THE WITNESS: Subsequent to the time that the keys were provided, given to him.

THE COURT: In other words, that would be after April 27th?

THE WITNESS: Yes, sir.

THE COURT: How did you come to know that?

THE WITNESS: Mr. Hammer told me.

THE COURT: Did he tell you what premises these were on Yaphank Road?

THE WITNESS: Well, not exactly, I wasn't sure, but I determined them to be the new residence of Mrs. -- Mr. Gradowski's mother.

THE COURT: I see, but the Bureau had nothing to do with making that transfer?

THE WITNESS: No, sir.

THE COURT: Of this Cadillac to Yaphank Road?

THE WITNESS: No, sir.

THE COURT: I see. Thank you very much. Mr. Roland Thau?

MR. THAU: Thank you.

CROSS-EXAMINATION

BY MR. THAU:

Q Agent, did you reduce to writing the report that George Hammer told you that a Jack had delivered the car to his property?

A I put in the report whatever nickname he provided

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me with, yes, sir.

Q By the way, have you had occasion to discuss this case during the lunch break with your partner, Agent McMullen, who testified here this morning?

A No, sir, except he did ask me if I knew a Stanley Cohen.

Q Since we are at it, do you?

A No.

Q Do you know him to be one of the suspects in this affair?

A No, I don't.

MR. BUSH: Same objection as to this line of questioning.

THE COURT: Yes.

MR. BUSH: As when it came up at the first examination.

THE COURT: I would agree, but for the added reason that Mr. Scuderi has told us he doesn't know this man. Therefore, how could he say anything about whether or not he is a suspect?

MR. THAU: Knowing him and knowing of him might be something else.

THE COURT: Anyway, I agree with counsel that that is tangential, to put it kindly, to our inquiry here.

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Q Mr. Scuderi, did you return to the Hammer property with two or was it four local law enforcement officials?

A There were three on the property of Mr. Hammer in addition to Agent McMullen and myself.

Q So there were five of you altogether?

A Yes, sir.

Q On your return after checking out to whom the car belonged?

A Yes, sir.

Q Did you at that time when you first went to the Hammer property on the 13th, come there equipped with an arrest warrant?

A No, I did not.

Q One had been issued, I understand.

A Yes, it had been.

Q Did you inform Mr. Hammer that a warrant was in fact in existence?

A Yes, sir.

Q May we take it from the fact that you did not come with the warrant itself --

A Not to display, no, sir.

Q May we take it from the fact that you did not come with the warrant itself, that you felt that there was little chance of these gentlemen's apprehension at the Hammer home?

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A Little chance?

Q Yes.

A No, sir, that's not a conclusion that I could draw, no, sir. A fugitive can be most anywhere.

Q Did you, sir, or your partner in your presence make any representation to Mr. or Mrs. Hammer, any legal representation regarding your right to search their house without a warrant under the circumstances?

A I believe Agent McMullen, when Mr. Hammer asked whether we had a warrant, search warrant, may have stated, and I believe did state, that under the circumstances where there was reason to believe that the fugitives could be located at the residence, that access could be gained on those grounds.

Q Without a warrant?

A Without a warrant.

Q You were McMullen's superior at that point?

A No, we were in equal rank.

Q I am sorry. When you said case agent, it doesn't give you a supervisory --

A We are both special agents, carry the same credentials and we are of equal rank.

Q Did you at that time correct his misstatement on the law to those citizens, the Hammers, to whom the representation had been made?

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MR. BUSH: Objection, calling for a legal conclusion.

THE COURT: I am going to sustain that. There is a very simple question here, however, and an obvious one. I take it you didn't say anything further or to the contrary when you heard McMullen say what you just described?

THE WITNESS: No, sir.

THE COURT: All right.

Q And it's not until Agent McMullen stated what he did about the law that the Hammers permitted or allowed a search of their house?

A Yes, sir.

Q And the search of the car was made subsequent thereto; is that right?

A Yes, sir.

Q Also in keeping with that representation of what the law was; is that correct?

A That did not -- that was not raised.

Q It was not repeated?

A It was not repeated nor questioned.

Q How much time elapsed, would you say, between the search of the house itself and that of the car?

A Within a half hour.

Q When you came back from such place as you were told Gradowski might be found, having left McMullen on the Hammer

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property, was the trunk of the car still open?

A When I returned?

Q Yes.

A Yes, it was.

Q Had McMullen taken from it whatever he would ever take out of it, or was he still in the process of removing anything from it?

A He was just finishing up. Whatever was left was of -- as far as quantity, it wasn't that much.

Q What had he done, dumped it on the ground next to the car?

A No, he put it all in an envelope, in a manila envelope with a tie string that was in the car.

Q You were led to understand, were you not, that there was an envelope in the car, and that in addition to whatever its own contents were, McMullen had also stuffed in that envelope additional material which perhaps had been loose in the trunk?

A Yes, sir.

Q Are you in a position at this time as concerns the ultimate contents of that envelope to segregate that which was in the envelope to begin with from that which was on the outside of it but which McMullen for the sake of convenience stuffed into it?

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A No, sir.

Q Did you, Agent, have any occasion to ascertain whether any of the stuff that was in the car, be it in the passenger section of it or in the trunk, belonged to this defendant Richard Nash?

A No, sir.

Q Did you see a sleeping bag there?

A Yes, I did.

Q Wearing apparel?

A Some.

Q Shoes?

A I don't recall the shoes.

Q Any valise, attache case, or some such containers?

A No, there was various garments. There was uneaten food. That's about the best --

Q Garments, you say?

A Could have been a sock.

Q Is that what you mean by garment? Were there any overcoats or suits, that sort of garment?

A I don't recall. There could have been. I don't recall.

Q As a result of which, of course, you wouldn't recall whether any searches were made of the pockets of those garments to ascertain whether any identification papers might have

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been found therein?

A I don't know.

Q Was any attempt made, sir, to determine scientifically whether the fingerprints of this defendant appeared on the steering wheel of that vehicle?

MR. BUSH: Objection as to relevancy.

THE COURT: Yes.

MR. THAU: May I be heard on that, your Honor?

THE COURT: I don't quite follow this. We are not here to have a general rummage. We are here to find out whether or not this search was lawful, and whether or not the defendant Nash has standing to challenge same.

MR. THAU: Your Honor, my argument is very short here, and I am addressing myself specifically to standing. It's conceded by now the car was not registered in his name. However, if indeed this defendant was using the car as though it were his own, and certainly his fingerprints on the steering wheel would indicate very recent use thereof --

THE COURT: But we have to view the matter as of the time when the search occurred in order to determine whether or not there was probable cause and so on. Therefore, I find it somewhat off the point to find out what happened later.

MR. THAU: No, earlier, your Honor. I am interested in knowing whether, when these agents came on the scene, they

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caused the steering wheel to be dusted so as to find wheth
in the immediate past perhaps this defendant had driven th
vehicle.

This is relevant to the issue of his use of it.

THE COURT: It seems to me slightly to tax one's
credulity that they dusted the car from fingerprints from
what I have heard anyway, but in any event in the argument
I will allow you to ask whether or not there were any atte
made to lift latent fingerprints from the car on that day
when it was searched, April 13th.

THE WITNESS: No, sir.

THE COURT: None.

Q Nor on any other part of the vehicle, I assume?

A Right, sir.

Q Was this a rainy day?

A No, it was not.

Q Not snowing either, I assume, from the date?

A I beg your pardon?

Q Not snowing either, I assume, from the date?

A No, it was not.

Q Are you familiar, Agent, with an inventory suppl
me by Mr. Bush, which is FBI Form 302 giving a list that w
found in Gradowski's car?

A Not completely. I am aware of such a report.

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Q May I show it to you and ask you to just glance at it? Have you seen that document today?

A This document?

Q Yes.

A Not today.

Q Were you instrumental in preparing it?

A No, Agent Norton was. He is the author of this by the fact that it says by --

Q Norton was not at the scene when the seizure was made; is that right?

A No, he was not.

Q May we take it that Norton relied on you and McMull that is, relied on your turning over to him, when he prepared the contents of this document?

A Yes, sir.

Q Was anything seized on that day and stuffed in the envelope by McMullen which is not listed in this 302?

A May I see that, sir?

Q Or to put it another way, was everything that was i the envelope placed in this 302?

A I don't know.

Q May we take it that, concerning this list that you hold before you now, it included only such contents of the envelope as your agency deemed relevant to this case?

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MR. BUSH: Objection. The witness answered he didn't know. I don't see how he would be in a position to have the knowledge to answer that question.

THE COURT: First of all, I agree, but in any event, Mr. Thau, I think we can take it from what has already been said that this witness did not prepare this report, which is obviously signed by Agent Norton.

Second of all, McMullen is the man who made the actual search and the seizure, as I understand.

But to make it abundantly clear, so that we can move on to something else, Agent Scuderi, you are unable to look at this 302 of Norton which contains this inventory and state from your own knowledge whether this is all that Agent McMullen removed from the trunk?

THE WITNESS: Yes, sir.

THE COURT: You can't?

THE WITNESS: No, I cannot.

THE COURT: You are in no position to tell us anything on that?

THE WITNESS: No, sir.

THE COURT: All right.

Q When McMullen removed the stuff from the trunk, did he and you then repair to some office and look at the contents of the envelope?

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A I reviewed the contents.

Q Did you make an inventory at that time?

A No, sir, I did not. I labeled it. I identified the envelope with my initials and the date, and I put a cover on it to identify it and I contacted Agent Norton to tell him of the fact that these papers were found, and that he being the case agent would best know how many leads were there and what the value was.

Q He saw the contents some twelve days later, I believe; is that correct?

A Well, he was sent the contents by registered --

Q I call your attention to the document, and ask you whether reading the top paragraph of it refreshes your recollection concerning when Norton actually examined the contents.

A That is examined, but the receipt could be something else.

Q Where is that envelope, by the way, which you signed and sealed or intialled? Do you have it here?

MR. BUSH: The envelope appears --

MR. THAU: May I see it, Mr. Bush? May I walk over and look at it?

Thank you.

Q Did you, Agent, at any time or did McMullen in your presence say either to Mr. or Mrs. Hammer that if they refused

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permission to look either in the house or in the car, they might be liable to a charge of harboring a fugitive?

A Both Mr. and Mrs. Hammer were told on a number of occasions about the harboring Statute, and that there is a violation for harboring a fugitive, and at what stage it was told, it was told several times. I told Mr. Hammer that the first time I met him.

Q But did you tell him that once again on the 13th?

A Oh, yes.

Q Shortly before McMullen went to the car?

A I told him that the first time we left. I could have repeated it the second time, but this is a routine notification we give to people who might have information and might be withholding it.

Q You say you told him this when you left. I assume you mean when you left the first time to check upon the ownership of the car.

A Yes, sir.

Q Did you tell it to him upon your return again?

A Yes, sir, I may have.

Q And it's very shortly after that you were permitted to search both the house and the car?

A Well, time sequence, whether it was just before or moments before I cannot say.

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Q And at first you were offered some resistance when the Hammers felt you ought to have a search warrant, I believe?

MR. BUSH: Objection, calling for a conclusion.

THE COURT: Yes. In any event, we have made that point clear.

Q In the course of such investigation as you or your Bureau made of this case prior to April 13th, or up to the time when the search was made, say, did you have any leads about that car?

A Not that I recall, sir, no, sir.

Q Had you any indications that Nash and Gradowski, either together or separately, were using a vehicle to travel?

A I may have asked on the first visit with Mr. Hammer if either one owned a vehicle, and Mr. Hammer told me, I believe that Mr. Gradowski owned a vehicle.

Q Did he ever tell you that Nash owned a Cadillac?

A Either Nash or Gradowski, one or the other.

Q So it's possible that Mr. Hammer might have told you that Nash owned a Cadillac?

A Or Gradowski owned it.

Q Yes, one or the other.

THE COURT: This was on February 6?

THE WITNESS: Yes, sir.

Q Have you since, sir, in preparation for trial and

in the course of your investigation, you or your Bureau, tracked down the whereabouts through the months when you were looking for these gentlemen, the whereabouts of Nash and/or Gradowski so as to be able to say on such and such a date we learned they were in Nevada or some such place?

A I don't know.

MR. BUSH: Objection as to the relevancy of this line of questioning.

MR. THAU: The relevancy again, your Honor, is to show who possibly --

THE COURT: Well, he has answered no, so we don't have to belabor it.

Q Have you to this day, Agent, come across any information showing that this defendant had use and control of that vehicle prior to April 13, 1973?

A I don't know.

Q You have no information showing that he did or showing that he did not?

A I personally?

Q Yes.

A No, sir.

Q You never had such?

A I never had such information.

Q When you went through the envelope shortly after

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the seizure, did you segregate that which interested you from that which didn't, if there was anything that did not interest you, and if you did so, what became of that which you set aside?

A I did not.

Q Did anyone, to your knowledge?

A I don't know, unless it was transmitted to Agent Norton, and Agent Norton would be the best one to answer that question.

Q To finally put this to rest, let me get something straight: You and McMullen after the seizure opened the envelope and looked at the contents; is that right?

A I did, yes, sir.

Q And you examined each item?

A I reviewed it, yes.

Q Did it interest you or didn't it?

A Well, I didn't have any final opinions about it, being -- being the fact that I had just a lead to locate and apprehend at a particular address.

Q Would it be fair to characterize your function at the Hammer home and its whereabouts that day as having nothing whatever to do with an investigation of the merits of this case but with having to do simply, strictly, solely with the apprehension of two fugitives?

A Primarily, yes.

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Q You hadn't spoken to any of the complainants before?

A I beg your pardon?

Q You hadn't spoken to any of the complainants, those who had made the charges, the banks?

A No, sir, I haven't.

MR. THAU: Thank you, sir.

THE COURT: Any redirect, Mr. Bush?

MR. BUSH: No further questions, your Honor.

THE COURT: Thank you, Agent Scuderi. You may be excused, sir.

[Witness excused]

THE COURT: I take it, Mr. Bush, you don't wish to produce anymore witnesses?

MR. BUSH: At this time, your Honor, those are the only witnesses that the Government will call.

THE COURT: Now, Mr. Roland Thau, do you wish to call any witnesses?

MR. THAU: May I have one short second, your Honor?

MR. THAU: Your Honor, the defendant will take the stand on this motion to suppress.

[continued on next page]

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RICHARD NASH, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. THAU:

Q Mr. Nash, you are the defendant in this case, are you not?

A I am.

Q Are you familiar with one Peter Gradowski?

A I am.

Q How long have you known Mr. Gradowski?

A Since 1958.

Q Since 1958 have you known him sporadically, continually, what?

A Well, sporadically. Sometimes he's been -- we haven't been in touch with each other for years at a time.

Q Up to April 13, 1973, going back three or four months backward into 1973, the end of 1972, were you or not in contact with Gradowski?

A I was.

Q Continually, sporadically?

A Almost continuously.

Q When, as precisely as you can make it, did that continual one-period contact begin?

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A Say in January.

Q Of what year?

A '73

Q Where is that you renewed ties or acquaintance with Gradowski in January of '73?

A Well, I had had -- I misunderstood your last question. I had been in contact with Mr. Gradowski since January of '71, and what I thought you meant by the continuous is when, you know, I was in his company.

Q Living with him, so to speak?

A That's correct.

Q So that for two years, more than two years before April of 1973 you were frequently together, you say?

A Right.

Q You had once been in jail with Mr. Gradowski, hadn't you?

A Yes, I had.

Q How long a period of time?

A I was in the same prison with him for about ten months.

Q Didyou ever know Gradowski to own an automobile?

A Yes.

Q Around April of 1973 did he own an automobile?

A He owned a 1968 Cadillac convertible.

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Q What color?

A In April it was green.

Q How long prior to April did you know him to own that car?

A Close to a year.

Q Was it ever a different color than green?

A When he originally purchased it, it had been blue.

Q In or about April 1972, which is the first time you saw the car, you say, right?

A Right.

Q Where is that Gradowski lived or hung his hat or hung out?

A 166 East 2nd Street, New York City.

Q Where were you then living?

A At that time he purchased the case? I was living at 111 St. Marks Place, Manhattan.

Q Both of those addresses are on the Lower East Side of Manhattan?

A Yes, sir.

Q Or euphemistically, in the East Village; is that correct?

A Right.

Q So that you were not only acquaintances but neighbors; is that right?

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A Yes.

Q Did you help contribute to the purchase of that car?

A Indirectly I did, yes. When he originally purchased the car, he didn't have enough money, and I put part of mine into it, and I never got all the money back because we used it on like various business transactions, and we decided it was parts of expenses, because at the time he owned another Cadillac, '65, which I was using, and we kind of interchanged the use of both vehicles, because I owned a truck at the time, but it was unhandy in New York traffic.

Q So you yourself owned a truck and a car, you say?

A Yes.

Q And he owned this Cadillac?

A Right.

Q You say there was an interchange of use of the three vehicles as between the two of you?

A Yes.

Q Do you know where he bought the car?

A He bought it from a private owner from Brooklyn, I believe.

Q You don't know the person's name?

A No, he's somebody from the U.N.

Q I am sorry?

A Somebody from the U.N. I wouldn't recall his name.

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He is Indian, I believe.

Q Did you learn what the purchase price was?

A $2,400.00

Q Do you know the manner in which that purchase price was paid?

A Cash.

Q Check?

A Cash.

Q You say you contributed part of the purchase price?

A Yes, he didn't have $2,400.00 cash.

Q How much of it did you contribute?

A I think about $900.00.

THE COURT: How much?

THE WITNESS: Nine hundred.

Q Did you get a receipt for that $900.00?

A Not -- We never gave each other receipt for anything.

Q So the answer is no. Did you ever collect any part of that $900.00 back?

A Yes.

Q How much of it?

A About $700.00. Then I put in -- I paid off a muffler, about $180.00 more I gave in to have a muffler put on it.

Q During such periods of time as both you and he used the car, did you ever get to use it by yourself? And by your-

self I mean without Peter being a passenger or was he always a passenger when you drove it?

A. No. I believe I probably used it more than he did in reality.

Q Could you estimate in terms of precentages of time what percentage of it you used it and what he did?

A I would say more than half. I would say maybe sixty seventy percent of the time.

Q Sixty or seventy?

A Sixty or seventy percent of the time I had possession of the car, mainly because it was easier for me to park it than it was for him.

Q Where would you park it?

A I would park it in front of my house or in front of the bar which I had something to do with on 9th Street, which I was also renovating, plus there was parking meters on the Avenue, and because of the time setup with alternate side of the street parking, we could use them at night, and have time to pick the car up in the morning without getting a ticket.

Q Did that 40-60 or 30-70 arrangement last until 1973, or did it end at some point?

A Well, when he took the trip, he went by himself, so he took the car by himself.

Q Trip out of town, you mean?

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A Yes.

Q Did you ever have occasion to take trips out of town?

THE COURT: With the car.

A I have been to Baltimore, I have been out to my sister, out on numerous occasions.

Q With the car?

A Yes.

Q And on such trips as you made to Baltimore, was it ever your practice to stop on the way, let's say at a motel or some such place, or would you make the trip in one swallow?

A We generally make it straight through.

Q Were there ever times when you didn't?

A Yes. I can't recall the date. It was in the winter. I believe it was prior to Christmas.

Q Did you stop off anywhere?

A I stopped because I was -- I was drunk when I left New York.

Q Not why, but did you ever stop-off anywhere?

A Yes.

Q Would that be a private residence, that of a friend perhaps, or a motel?

A I slept in the car.

Q Did you ever, Mr. Nash, have occasion to stop off anywhere with that car, anywhere where it would be your

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obligation, I suppose, to register the car that went along with you? Do you understand what I am leading up to?

A When I was by myself, no, I don't recall.

Q You would buy gas on the way, I suppose?

A Yes.

Q How many sets of keys were there to this car, to your knowledge?

A Four.

Q Who had them?

A I had a set, Pete had a set, there was a set at his mother's house, and the fourth set was like kind of unaccounted for. Sometimes I'd have it, sometimes it would be in the car or in the bar or in the club.

Q Do you have a set of keys in your personal belongings now?

A I don't know which keys I have right now.

Q Have you any recollection concerning when you were arrested, did you have the keys to the car in your possession?

A Yes, I did.

Q Do you know whether those keys were seized from you or returned to you?

A They weren't seized from me, no.

Q Did you at anytime after your apprehension turn over any part of the personal property you had with you at the time

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of your arrest, like the keys, for instance?

A Well, when I entered West Street, all my personal property was taken from me.

Q And it's kept there?

A Yes.

Q That would include the keys to the car?

A Like I say, I don't recall if they are in my personal property. It's a good chance they are.

Q You have listened to the proceedings here this morning, right?

A Yes.

Q And you know what the purpose of this proceeding is?

A Yes, I do.

Q And you know also that I am trying to illustrate your control and dominion over this car?

MR. BUSH: Objection, it's totally leading at this point.

THE COURT: I would agree, I think.

Q Mr. Nash, how long have you been a driver, by the way?

A Twenty-two years, I guess.

Q You have driven a good many cars, would you say?

A Yes.

Q Cars, as people, have their own personalities?

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A Yes, they do.

Q Could you in any way tell us, if you can, such peculiarities, idiosyncracies, that that particular car may have had on or about April 13th of this year?

A Well, the handling was bad, as usual, in the front end. I was driving it, it behaved normally. It floats at about sixty-five, seventy miles an hour.

Q Aside from its management, I am interested in its appearance also. Did it have a dent, a scratch here and there?

A No, the car physically was in nice shape, because it had been in an accident in Nevada, and we just had it repaired. It was a little dirty on the inside. There was food, food containers, my personal property and stuff.

Q What color was the upholstery?

A White, blue trim.

Q Was the rear view mirror inside hung from the ceiling or placed on the dashboard?

A It's attached to the frame of the windshield. It's a convertible.

Q The frame, the upper part or the lower part?

A The upper part.

MR. BUSH: Objection as to leading and also as to the relevancy.

THE COURT: I think it's irrelevant, but it's all

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right.

Q It was attached where?

A At the upper part of the windshield on the frame. As for the description of the car, it was green on the outside. It had a dirty white top. It was a white leather interior with blue carpeting, blue padded dash. The glove compartment door is cracked. The cigarette lighter doesn't work. The heater and air conditioner are very temperamental. I could go on about the car. I know it better than --

Q What kind of shifting was it, standard, automatic?

A Automatic.

Q When last did you drive that car before your apprehension?

A April 13, 1973.

Q Where did you drive it?

A I believe it's Rocky Point or Sound Beach, Long Island.

Q Is this where you picked it up or where you left it?

A That's where I left it.

Q Do you know about what time of day this was?

A It was in the evening.

Q In the evening of the 13th?

A Right.

Q Do you know what day of the week it was?

A No, excuse me, it was the evening of the 12th.

Q Was Gradowski with you at the time?

A No, not when I --

Q How long had you had personal exclusive custody of that car? When was it last that you parked it somewhere?

A I had it -- Well, exclusive -- I can't say exclusive. I had somebody in the car with me, not Gradowski, and I had had the car without Gradowski for about eight hours on that particular day.

Q Had you in the recent past before the date of April 13, 1973 been in that car outside the City of New York?

A On April 12th?

Q Yes, before then.

A Yes.

Q You said something about sandwiches before.

A Well, on the trip up from Florida, we stopped at many restaurants for sandwiches, coffee, things like that.

Q You had just come from Florida, you are telling us?

A Yes.

Q In the car?

A In the car.

Q Was anyone else in the car at the time?

A Peter Gradowski was in the car with me on the way up.

Q Did you have personal effects in the car?

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A Yes, I did.

Q Did you ever have occasion to lend the car to anyone at all?

A Actually I have, yes.

Q On such occasions as you did so, was it your practice or your understanding with Gradowski that you would first clear it with him, or could you do it at will as though the car were your own?

A No. As a matter of fact sometimes I lent the car to people he did not like.

Q Did not like?

A Yes.

Q Did Gradowski ever learn of that?

A Yes, he did.

Q Did that ever result in his barring you from further use of the car?

A No, but we had an argument about it. See, Mr. Gradowski is a very proficient driver, to say the least, and this is known among all his friends, and my relatives wouldn't ride in a car when he was driving. This was a --

Q I am sorry?

A This is why I drive most of the time.

Q You heard testimony from the agents earlier to the effect that the car ended up at your sister and brother-in-

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law's house, the Hammers, where it was searched on April 13, right?

A Yes.

Q Have you any knowledge concerning how that car came to be at the Hammers?

A Yes.

Q How?

A I brought it there with an assist from a friend, because I didn't want to --

Q How did you bring it with an assist?

A Well, I drove it out there, becuase it's kind of hard to give directions to my sister's house to somebody from New York.

Q You drove the car yourself?

A I drove it from as far as a grocery in, I think, Stony Brook, whatever the heck name it is, named Scotty's.

I got out of the car then and told the guy just follow the street down till you come to the end of it, you go through the brick fence, and it's the first house on the left. Bring the car there andtell them --

Q You knew you were wanted at this point, didn't you?

A Yes, and I didn't want to go on my sister's property

Q Did you extend to anyone at all permission to search that car?

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A No, I didn't.

Q Were you at all in telephone communication with your sister and your brother-in-law?

A Occasionally, yes.

Q Were you that day, before the car was delivered?

A I was.

Q You were?

A Are you saying did I call my sister?

Q Yes. Did you call them?

A Yes.

Q That day?

A That day?

Q Yes.

A Yes.

Q Was it before the delivery of the car?

A It was.

Q Did you announce the car was arriving?

A If we are speaking of the 12th, yes.

Q Did you give any instructions concerning what was to be done with the car or how long it was to be kept there or how long it would be before someone moved it?

A It was rather an open proposition. I told him I didn't know when I would come and get it. I hoped I would be able to move it soon. I didn't know who -- Pete's mother

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had a house in the area, but I had no idea how to get to it myself, and there was stuff in the car that I left at my sister's house, so this is primarily what made me lean towards leaving the car there.

Q Let me go back just for one second. You said there was an accident with the car; is that right?

A Yes.

Q Who was driving it at that time?

A Peter.

Q Was a motor vehicle report filed in connection with the accident, do you know?

A No.

Q When last you saw the car and it contained some of your personal belongings, would you please give us as complete a list as you possibly can do of those personal belongings you had in the car that belonged to you?

A Well, I had my shaving, toilet articles, slacks, shirts, underwear, a green knapsack, a sleeping bag, dog food, and just general personal items that you have on road trips.

MR. THAU: Thank you, sir.

THE COURT: Mr. Bush?

CROSS-EXAMINATION

BY MR. BUSH:

Q Mr. Nash, is your real name actually Richard Nash?

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A Richard Patrick William Nash.

Q You said on direct examination that you had called your sister on April 12, the day preceding the day you took the car to Long Island; is that correct?

A Yes, I did.

Q I take it that you spoke to her personally on that occasion?

A If I called her, yes.

Q Did you also speak to your brother-in-law on that occasion?

A I believe I spoke to Brian.

Q Excuse me?

A I believe I spoke to Brian.

Q Who is Brian now?

A He is my nephew.

Q Did you also speak to your brother-in-law?

A I may have said hello to the whole family. I don't recall the conversation, everybody talking.

Q Did you tell her that your name was Jack?

A No.

Q Did you tell them where you were?

A No.

Q Did you tell them that you were bringing Gradowski's car over for safekeeping for Gradowski?

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A No, I said I wanted to leave the car there, would it be all right with them, and they agreed to it.

Q Did you tell them what they should do with the car?

A Just leave it there, I'd probably pick it up.

Q Did you give them permission to drive the car around

A They got -- they have standing permission to drive it.

Q They have permission to move the car, in other words, wherever they wanted to move it, I take it?

A Yes.

Q Did you arrange to have the keys left with them?

A They would be left with the car, yes.

Q Prior to the date that you spoke to your sister on April 12, when was the last time you had seen her, or your brother-in-law?

A Last time I seen Mary and George before April 12, before I went to Florida.

Q Roughly when was that?

A I'd say January.

Q Of 1973?

A Right.

Q Did you tell them where you would be?

MR. THAU: Objection, irrelevant.

THE COURT: Wait a minute. I must say I don't quite

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understand the purpose of this either. What is the purpose of all this, Mr. Bush?

MR. BUSH: Your Honor, he went to great lengths saying where he had been and whereabouts in respect to the car on his direct examination, and I think that we are entitled to inquire as to these matters as well.

THE COURT: That sounds great, but it doesn't say anything. Unfortunately, a general fishing expedition here isn't quite what I think we should get into, because this can't be used, you know, for that purpose under the law. I'm going to sustain that objection.

I don't object to your asking him when he went to Florida and how long he was there, but I think conversations with his sister going way back then are a little too much.

Q You said on direct examination that you knew Peter Gradowski; is that correct?

A I said that I knew him?

Q That you knew him.

A Yes.

Q That you had known him for a number of years?

A Yes, I said that.

Q Did you ever know him to use the name Gary Essig?

MR. THAU: Objection, irrelevant.

THE COURT: I agree. I don't see what that has to

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do with our limited inquiry.

MR. BUSH: Part of his claim, your Honor, is that he was apparently bosom buddies with Gradowski, and therefore through some measure of --

THE WITNESS: I didn't say bosom buddies.

MR. BUSH: -- claims an ownership interest with Gradowski in the car.

MR. THAU: He definitely contends that this defendant-

MR. BUSH: Just one second, Mr. Thau. The Government, I think, is entitled to inquire as to the extent to his knowledge and relationship with Mr. Gradowski.

THE COURT: Again, it sounds great, but it's awfully overwhelmingly broad, and I don't see whether or not he knows about some alias that you have every reason to believe, I am sure, that Mr. Gradowski used, it doesn't really go to the heart of our problem; so I see no real basis for it.

I am trying to grope for something that will let me decide this express issue, and the standing issue, but I don't think that helps, so let's get to something else.

MR. BUSH: I would ask that this envelope and the different documents in it be marked collectively as Government Exhibit 3, and that this folder and the documents within it be marked collectively as Government's Exhibit 4.

xx [Government's Exhibits 3 and 4 marked for

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Identification]

Q Mr. Nash, I show you the contents of what are Government's Exhibit 3 here, and I am going to ask you item by item as we go through whether you claim that this property was yours, if you had any ownership in it whatsoever.

MR. THAU: Your Honor, I object to that in that ownership has nothing whatever to do with the subject matter of this motion. The defendant's contention is that he is an agrieved person in that he is one against whom certain physical evidence will be introduced --

THE COURT: No, no. Let me stop you right here. This is being made into a battle of absurdities. First of all, I would agree with you, Mr. Thau, to the extent your objection goes to the legal sense. I don't expect that we are going to badger Mr. Nash with the nuances of legal title, and you don't either, but I do think the Government is entitled to ask as to whether or not he claims he owns them in the standard sense that all of us use that word.

MR. THAU: May we first know what they are before he is asked?

THE COURT: I don't know any more than you do, but we will get that out. They are right here visible in open court, and there shall be no surprises, I assume, so let's go on.

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THE WITNESS: Do I own this?

Q Did you own it now? Do you claim to own it now or have you owned it at anytime during the last seven or eight months?

A Well, using the standard definition of "owned", I'd say no.

Q Similarly, I show you that document..

THE COURT: Would you give us a little idea for the record as to just what these are generically?

MR. BUSH: Very well. These are items which were seized from --

THE COURT: No, no, I understand that. You and Mr. Thau really drive me up the wall. Now come on, it's a practical matter. Is it an insurance policy; is it a passport? You know what I mean.

MR. BUSH: These are all various documents --

THE COURT: Just tell us what they are so we can follow.

MR. BUSH: -- which relate to banks in the sense of blank checks, deposit slips --

THE COURT: I know, but you hand these things separately to Mr. Nash. Tell us, is it a blank check, is it an insurance policy?

MR. BUSH: Very well. The first item which I showed

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to Mr. Nash was a series of blank checks drawn or bearing the name Public Service Electric & Gas Company, and also the name Virginia Electric & Power Company.

The second items which I handed to Mr. Nash were blank deposit slips purportedly on accounts at the Bankers Trust Company here in New York City. I would call to the witness's attention that there are a number of these documents in here, all of which seem to be the same.

Q Referring you to that second group of documents or number of items, all of which were blank deposit slips --

MR. THAU: Your Honor, we concede non-ownership in this case to all the documents which Mr. Bush is willing to proffer here. I don't think that affects our case on the motion in the least. We will concede non-ownership.

THE COURT: This is like being in Alice's garden with the two of you. Let's get down to it. I think it might be hightly irrelevant. You have elicited from Mr. Nash, and I don't blame you, that he had certain personal property which he was at some pains to describe. It did not include any material such as this, I agree with you, but I see no harm in showing it to the witness and asking him if he has at any-time claimed or does he now claim that he owns these.

MR. THAU: I was trying to save the Court some time, that's all.

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THE COURT: In fairness to you and to Mr. Nash, I would think you would want to look at this so you won't be entrapped in any way.

MR. THAU: I haven't seen it, your Honor.

THE COURT: I don't know that Mr. Nash has seen it.

MR. BUSH: I am sure Mr. Nash has not.

THE WITNESS: Seen what?

Q Do you claim to have owned in the past six to eight months or own now the property which is in your hands at this time, which I previously noted are blank deposit slips from the Bankers Trust Company?

A You mean these specific blank checks, you want to know -- These deposit slips?

Q Those specific ones.

A If I own them? If they were mine, I couldn't tell you if they were. There is nothing on them to identify them. I couldn't identify them.

Q Did you own similar ones to this?

MR. THAU: Objection as irrelevant and highly speculative.

THE COURT: The exigencies of the criminal law today are difficult enough without making any more difficulties than there are. I tell you what you do, Mr. Bush: Apparently you are going to lay this all out seriatim, right?

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MR. BUSH: I plan to do that, or I can show them to him collectively.

THE COURT: Why don't you get all these in front of Mr. Nash. He seems to be a reasonably intelligent man. We will ask him.

Q Very well. I lay out in front of you collectively all of the contents which were contained in what has been marked as Government's Exhibit 3, and I ask you first for you to go through and pick out any of the items which you claim to own now or have owned in the past, anytime during the past eight months.

THE COURT: While he is lookin at that, we will take a recess of about ten minutes.

[Recess]

MR. THAU: Your Honor, concerning the outstanding question, I trust that all the documents shown Mr. Nash are among those seized from the car, for if they were not, I would have an objection to any such others.

THE COURT: I would agree, but I am assuming, Mr. Bush, in other words, that the contents of Exhibits 3 and 4 is what the Government claims were seized from the trunk of the Cadillac. Is that correct?

MR. BUSH: That is correct, your Honor.

THE COURT: I hope so. It seems to me that in order

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to short-cut things, Mr. Nash has had a chance to look at all of the contents of what we now for this hearing know as Government's Exhibit 3; is that right?

MR. BUSH: That's correct, your Honor.

THE COURT: I think you are entitled to ask whether he claims any possessory interest or ownership in those documents. Although I gather from Mr. Thau the answer to that is no, I don't see why you can't ask him.

MR. BUSH: I plan to do so.

THE COURT: All right.

CROSS-EXAMINATION CONTINUED

BY MR. BUSH:

Q You have examined all the documents contained in Government's Exhibit 3, and I ask you whether you claim now to own these documents or to have owned them at anytime during the past eight months?

A Three was those things you just showed me, right?

MR. THAU: I am sorry, I didn't hear the answer.

THE WITNESS: Three was the plastic envelopes?

Q All of the documents that were placed before you.

A No, I don't own them.

Q On April 13, 1973 do you claim to have had any interest in these documents, whether directly by your own possession or indirectly in the way of direction to some other

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person to possess them for you?

MR. THAU: Objection. I don't understand the question. In any event, even if I understood it, it's too remote.

THE COURT: Perhaps you are right, or at least I will put it this way: I think maybe a better way of putting this, Mr. Nash, as I understand it, you don't make any claim, direct or indirect, to any ownership or control over these documents which are, as you put it, in these glassine bags or envelopes, right?

THE WITNESS: I don't claim I own them, no, your Honor.

THE COURT: Do you claim any interest in them?

THE WITNESS: Like the 13th I didn't have the car. I had left the car at my sister's house.

THE COURT: I know that, but whatever that may be, looking at those documents now, did you have any claim to these documents then or at anytime in the last eight months?

THE WITNESS: No.

THE COURT: All right. Is that all of it, Mr. Bush, or are there other documents?

MR. BUSH: These are the entire documents which the Government plans to use, and which were seized from the car. There were other documents seized as well. To the extent they really relate to this motion, I would also show them to the

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witness and ask him the same questions, and that would basically be it.

THE COURT: I think we have to assume, so that we get down to this, and finally get in a position to resolve the true issues here, we have to assume that the motion to suppress is directed to each and every thing that was seized that day.

MR. THAU: That's correct.

THE COURT: I have been proceeding on that basis. I think you ought to therefore govern yourself accordingly.

MR. BUSH: I plan to do so.

MR. THAU: I would say further, your Honor, now for the first time, and I have tried to get this from the witnesses unsuccessfully, I must say now for the first time do I learn that there are other documents which are not sought to be introduced. Perhaps those might be of assistance to me showing this defendant's control of the car, and ought to have been shown to me.

THE COURT: Wait just a minute. There is another angle to it here. I don't think that we are talking about any distinction that the agents made. I think we are talking about a distinction that Mr. Bush as the prosecutor has made. Am I correct in that, Mr. Bush?

MR. BUSH: I assume that to be the case.

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THE COURT: I hope you know by this time.

MR. BUSH: As far as I know, the items contained on the sheet that was presented to you are the items which are believed to have had any bearing on the case.

There may have been maps and things seized as well that are not --

THE COURT: Wait a minute. Then you are pressing this Court to go forward with all dispatch, and you tell me something like that, and that gives me the cold willywads.

There has to come a time, presumably now, when you know what we have here in this case. I insist on knowing. We have before us two exhibits, Government's 3 and Government's 4. Can Mr. Thau and I know at long last, are these all of the documents seized, or are they not?

MR. BUSH: Government's Exhibit's 3 and 4 comprise all of the documents seized.

THE COURT: What you are telling us, however, is that you may not offer all of the documents, assuming the suppression motion is denied?

MR. BUSH: That is correct, your Honor.

THE COURT: That I can assume. Now let me put the further question: Is there anything to make you think that Roland Thau, as counsel for Mr. Nash, has not been shown all of the documents which you believe to have been seized on

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April 13, 1973?

MR. BUSH: Yes.

THE COURT: He has not seen all of them?

MR. BUSH: No, there are some documents that I believe have no material bearing on the case.

THE COURT: Whether they have or they have not -- you may be right on that in the strict sense, but I think I am going to rule right now that Roland Thau is entitled to see all of those.

MR. BUSH: I have no objection to that.

THE COURT: I should hope not. Which are those you have in front of you, Government's 3?

MR. BUSH: Government's 3, which I have completed with, are the documents which Mr. Thau has seen.

THE COURT: All right. How about Government's 4, that is the manila envelope?

MR. BUSH: Government's 4, I don't believe Mr. Thau has seen the documents which are contained in Government's 4.

THE COURT: Now is a good time to start having him look at them, and also Mr. Nash.

MR. BUSH: Perhaps we could begin with just the envelope and then we will go on to the contents itself.

Q Mr. Nash, I show you the outside envelope of what has been marked as Government's Exhibit 4, and ask you whether

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that is an item which you claim to own now directly or indirectly or have had a direct or indirect ownership interest in in the past eight months.

MR. THAU: Your Honor, I will object to the question, for this reason: We now move into documents not sought to be introduced in evidence, and which have not been shown me.

Had they been shown me, I perhaps might have culled from them some corroboration of my contention that this defendant had control over the car.

THE COURT: You may be right on that latter point even without seeing these, but that is neither here nor there for the moment. The point is, Mr. Thau, as you just heard me say, by this time it must be clear that there are reasons to believe that we are proceeding with reckless amateurism here, and I am not very happy with any part of this on either side.

Now let's get down to it. I want you to see, because in my judgment you are entitled to see all of these documents. Whether the Government intends to offer them or not is beside the point at this stage certainly.

If you would like time to look at these now, that I would agree with you on, but I am not about to adopt your conclusions of law which tc me seem to be counter productive from your own point of view.

Look at them. Here they are. Take a look at them.

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I suggest to you again that you take some time and allow Mr. Nash, so we can save some time, which we have spent more time whiffling today, than we done anything else. I am beginning to feel more and more strongly that this Court has been totally misled as to the time of this case, and that I have been overly indulgent to both the Government and the defendant in these delays heretofore, which have not been productive of anything. Let's look at them.

MR. THAU: I would ask for a recess for the examination of these voluminous papers, your Honor, before the witness be asked any questions concerning them.

THE COURT: I certainly agree he won't be asked any questions until you and he have had a chance to look at them, and I will take a recess.

Let's get at it, because time is marching on, and you don't seem to be getting very far, either one of you.

[Recess]

THE COURT: Now, have we had a chance, Messrs. Thau and Bush, for Messrs. Thau and Nash to look at these latest documents, which I see are spread out in a pile before Mr. Nash in the witness box?

MR. THAU: We have, your Honor, and the witness has segregated the documents in two piles, three piles to be more exact, but principally two. One is that of documents which

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he will claim ownership of, and the others to which he will not.

There is a third category, to which he does not claim ownership but which I will make use of on redirect, if I might very quickly, to corroborate some of his direct testimony.

THE COURT: That is all right, very good. That is some help.

Now, Mr. Bush, do you want to finish your cross-examination?

MR. BUSH: Let me just identify the three different piles that we have here.

CROSS-EXAMINATION CONTINUED

BY MR. BUSH:

Q I take it that this first pile, which is contained in this manila envelope, is the pile of documents which you claim to have no ownership interest and never have had an ownership interest in during the past eight months; is that correct?

A That's right.

Q I also take it that the second pile of documents are not documents that you claim to have an ownership interest in but documents which show various repair jobs that were done to the car; is that correct?

A Yes.

Q Finally, this third pile, I take it, are all documents that you claim to own at this time or had an ownership interest in at sometime during the past eight months; is that correct?

A Yes.

Q Did you or do you claim to have an ownership interest in these documents today?

A They are still mine. I don't have them, but they are mine.

THE COURT: What have we got here, Mr. Nash, separately? What are these?

THE WITNESS: I have a card from my construction business --

Q Let's segregate that out. Which one would that be?

A This one. I have an identification card from New Queens Jail.

Q Let's start with the top. This identification card, I take it, is in the name of George Freedie. It's got a photograph on it.

A Of me, and a fingerprint.

Q The second document, I take it, is the Varna Repair Company, also bearing your name. The third document is the Michelangelo Social & Athletic Club. The fourth document is

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the Alpine Wine & Liquor, apparently an advertising card of some sort from that outfit. The next document is a card from a law firm, Cohen, Cooper, Wallach & Condon. In fact, there are four of those documents, all the same, with one exception. I note that one of the cards says, "For Gene Ann Condon." The other three cards are for Ivan N. Cooper.

We have an inmate receipt, and I ask you, Mr. Nash, from where did that receipt come?

A Queens House of Detention for Men.

Q Was that given to you on or about the date on there in the House of Detention?

A Yes.

Q I see three documents which relate to Merrill, Lynch Pierce, Fenner & Smith, all bearing the name, at least in part Mr. George Freedie. Are those documents which also relate to the time that you were in the Queens House of Detention?

A Excuse me?

Q Do they relate to the time when you were in the Queens House of Detention?

A Indirectly.

Q By indirectly, did you procure these documents or did Gene Ann Condon procure them?

A I procured them.

Q What did the documents represent, what type of

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transaction?

A Bought some school bonds.

THE COURT: May I suggest, gentlemen, that these thre separate piles as delineated be respectively marked Government's Exhibits 4A, 4B, and 4C for identification.

MR. BUSH: Let me have them marked in that fashion. The first pile, the items which he claims no interest in will be 4A. The second pile collectively will be 4B, and the third pile collectively will be 4C.

xx [Government's Exhibits 4A, 4B, and 4C marked for Identification]

THE COURT: So that we clarify things again to the extent we can, I take it, Mr. Bush, the Government would not be intending to use what we have delineated here as pile three or Government's Exhibit 4C for Identification? Those are documents which you just went over with Mr. Nash.

MR. BUSH: Yes, Exhibits 4A, 4B, and 4C, the Government has no intension of using.

THE COURT: That would certainly include C as well as piles one and two, or as you call them now, Government's Exhibits 4A and 4B as well?

MR. BUSH: That would be correct.

THE COURT: All right. Clear enough, Mr. Thau, so far?

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MR. THAU: Yes, your Honor, thank you.

THE COURT: Is there anything else the Government wishes to ask Mr. Nash on cross?

MR. BUSH: Just one last question, your Honor. I am not sure whether I got an answer to this before.

THE COURT: No, that's right, you were interrupted on that.

Q I show you what is still marked Government's Exhibit 4, and which is the red manila file folder, and ask you whether directly or indirectly you have an ownership interest in that, either today or at anytime during the past eight months.

MR. THAU: Your Honor, I object to the qualification directly or indirectly. Either one owns or one doesn't own.

THE COURT: Well, I wouldn't want to argue that under the law, but as a practical matter I agree with you. In other words, do you make any claim to that today or now as something you owned or still own?

THE WITNESS: No, but -- no.

MR. BUSH: I have no further questions.

MR. THAU: May I have just very quick redirect, your Honor?

At this time, your Honor, I would introduce as defendant's exhibit Government's Exhibit 4C for Identification

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which are those items which this defendant claims as his for the purpose of showing control of the car.

THE COURT: Yes. We will receive those as Defendant Exhibit C.

MR. THAU: As well as Government's Exhibit 4B for Identification, I suppose as Defendant's B, which are the bills showing repairs, collision type repairs of the vehicle in question.

THE COURT: I take it you are offering that to corroborate his testimony about the accident or accidents?

MR. THAU: That's correct, your Honor.

THE COURT: And perhaps, to a remote sense at least, the, shall we say, less than adequate abilities of one Gradowski as a wheelman?

MR. THAU: That's correct. I dont' like the term wheelman.

THE COURT: Yes, strike that. I meant it only as a driver, not in the connotation that it is sometimes used in other escapades, I understand. I mean it as a driver.

MR. THAU: Yes, thank you. That will be all, thank you, I have no further questions.

xx [Defendant's Exhibits B and C received in Evidence]

THE COURT: Any recross, Mr. Bush?

MR. BUSH: No recross, your Honor.

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THE COURT: Does the defense wish to call anybody else in this suppression hearing?

MR. THAU: No, your Honor.

THE COURT: Now, your argument in a few well turned sentences, Mr. Roland Thau, is what?

MR. THAU: Yes, your Honor, at this time we would move the suppression of Government's Exhibit 4 for Identification on the ground that these documents sought to be introduced in evidence against this defendant were seized from a vehicle which he had caused to be placed on the land of his brother-in-law and sister, and over which vehicle he, the defendant, had a pecuniary interest as well as constructive possession.

THE COURT: Let me just interrupt. You don't mean to limit this just to Exhibit 4 and its contents? You also mean to go to three?

MR. THAU: Yes.

THE COURT: Government's Exhibit 3 contains those documents which are in glassine envelopes and which, as I understand, Mr. Bush, are the documents which you intend to use if the law allows in this trial. Isn't that right?

MR. BUSH: That's correct, your Honor. There are additional documents, of course.

THE COURT: I understand, but just to breakdown what we have finally arrived at as to the precise breakdown --

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MR. THAU: That's correct.

THE COURT: You are including in your motion then the contents of Government's Exhibits 3 and 4, so to speak?

MR. THAU: That's correct.

THE COURT: All right.

MR. THAU: On the ground, your Honor, that the seizure here was against this defendant's rights against unlawful search and seizure.

It is but an accident of fate. your Honor, that Peter Gradowski is not sitting in the dock very much as Richard Nash is, and I don't think that the Government would presume to contest standing in Gradowski to suppress these documents were he a defendant, an active defendant in this case, and he is a defendant in this case, he is named in the indictment as well.

THE COURT: I understand your theory. In other words what you are saying is that, accepting Mr. Nash's testimony in particular, that really he is an aggrieved person within the statutory meaning, and that he has at least sufficient standing.

I understand that there is only one problem, and here is where I get confused. I understand your thrust so far, but where I go off the trolley is why you claim a non-possessory or non-ownership interest in some of these documents

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particularly in light of the teaching of United States against Brown. That doesn't help your position much.

MR. THAU: Simply because I have to go as the evidenc goes, your Honor. I cannot make an argument where the facts show otherwise.

If I understand your Honor correctly, the evidence shows that concerning the documents sought to be introduced in evidence, this defendant claims no ownership of them.

THE COURT: Right.

MR. THAU: Obviously, I cannot tailor the evidence to suit my argument. I have to do otherwise.

THE COURT: All right, but you see the difficulties, or to put it another way, if you go over to United States against Jones, we have other problems, because admittedly, according to his testimony and everybody else's testimony, Mr. Nash was not present.

He does not dispute that the keys were turned over, and he asked his sister and brother-in-law to keep the car for him. He was not there. He didn't tell his sister where he was, which I think was probably a tactful, brotherly thing to do under the exigencies of April 13th of this year. And there we are.

MR. THAU: Well, your Honor, the car, I think it must be conceded, was for all intents and purposes his and

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Gradowski's both.

THE COURT: Let's assume that as a practical matter, and we can analogize to an apartment. You are on the lease of an apartment, but you and Mr. Bush are good friends, and say you move in here, but whether you do or don't, the fact of complicity, there you are, somewhat like the odd couple, sharing this space.

MR. THAU: In our case, it would be supremely odd.

THE COURT: Superficially that may be so, but in any event, you see the point I make. You can analogize, yes, I understand that.

MR. THAU: Which is the Jones Case, by the way.

THE COURT: Except that the defendant there was actually present at the search.

MR. THAU: Yes. I don't think that Mr. Nash's absence in any way reduces the thrust of Jones in the least. Certainly people can be absent, and frequently are unless they be crippled either from their homes or from their cars. People simply do not live in cars, your Honor.

THE COURT: There is testimony here to the effect that somebody might have been living in this car.

MR. THAU: In a manner of speaking, yes, but the point is that a car is a receptacle that a person primarily uses principally for transportation purposes, and one is not

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glued as a permanent fixture to a car. As a result, I don't think that it's necessary for a car to present evidence of the Constitutional Mandate against unlawful search and seizure that its ownership or its part owner or one having an interest in it be permanently affixed to the vehicle. That would really be reading absurdity into the law.

I think that it is uncontested that the search of the car followed a misrepresentation, an egregious misrepresentation of law made by the FBI agents to Mr. and Mrs. Hammer

THE COURT: But that had nothing to do with the car as such.

MR. THAU: I believe it did, your Honor. As your Honor will recall, one of the agents testified that it was their custom, and in this case they repeatedly reminded the Hammers, that should they harbor the fugitives here, they might open themselves up to charges.

THE COURT: But that was incident to efforts to make them give a statement, and also, I surmise, and indeed I will find, had to do with their efforts to try to search the house.

MR. THAU: Right.

THE COURT: I have already told you that, standing alone, the search of the house on the claim of a valid consent doesn't impress me at all, and to that extent I do agree with

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you; but I think you have got to remember there is a lot of difference under Constitutional Law as between a house and home or a castle on the one hand and a car on the other. You and I and Mr. Bush know that. That's been true in the law from time immemorial, particularly since we have a situation here where the Hammers were in a position of having been caught flat out in a bit of a white lie, which in human terms I completely understand.

I have no doubt if I were the sister of Mr. Nash and the brother-in-law, I would not go out of my way to co-operate with the agents, knowing full well that the brother was a fellow who had had his scrapes before, and no doubt was in the middle of another one.

These poor people can't be blamed for that, but that makes it a different problem.

MR. THAU: Your Honor, I think on this issue there is case law that tells us that assuming the agents had no opportunity to get a search warrant --

THE COURT: As a practical matter, they really didn't.

MR. THAU: That is not so, I believe, because they barred the exit way so that the car couldn't be taken out. They could have planted someone there to see that nobody took anything out of it. They could then have taken their sweet

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time, and it's been done, as the Court knows, and gone to get a search warrant and then searched it.

THE COURT: You know, here we are seated in this relatively comfortable little room. Lawyers and Judges don't have the problems that these agents such as Scuderi and McMullen have. That doesn't impress me very much.

Sure they did tell us that they did ask the County Police to send out a container car, as they call it, but that really didn't do much good, and particularly looking at what they found in the car, a sleeping bag, there was even a cup half filled with coffee, and they are looking for two men, that they have been looking for some time.

MR. THAU: Your Honor, there is no probable cause in the law, as I remember it, for searching premises, and cars have been held to be premises, for the purpose of finding leads to the whereabouts of fugitives. If there is probable cause incidental to an arrest, there is reason to search, and one can use the result of that search.

THE COURT: Mr. Thau, you and I know that you can find so many different cases in this field, you know what the Fourth Amendment has spawned. Each case turns on its own peculiar facts. You just admitted that a minute ago, and I agreed with you on that.

But let me put it up to you. Your argument, as I

understand it, comes down to this: You heard the Judge say twice that he agrees with you that if we can confine the search of the house to itself for the moment, that that doesn't work on any theory of consent, because it seems to me that the agents were very truthful on this and other matters, and they virtually conceded that the Hammers were very reluctant to consent to that, and it was only after Agent McMullen had given his version of the law, which, whether you see it as totally fallacious or partly fallacious or entirely correct really doesn't make much difference. They were bamboozled into thinking that that was that and they had to consent.

Well, they didn't have to consent, as you and I know, and therefore I agree with you.

So then your argument is that that taints what happened thereafter, in effect.

MR. THAU: Not only taints it, characterizes what happened thereafter, because I see no difference whatever, your Honor, between the search of the house and the search of the car. One was almost contemporaneous with the other. One directly followed the other.

THE COURT: Sure, there wasn't too much time. As Agent Scuderi put it, it was within the next thirty minutes, and that is reasonable enough. It's pretty close in time all right.

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MR. THAU: It occurs to me that a person who would offer so grudging consent as was offered concerning the house was once again laying down, so to speak, as concerning the car.

THE COURT: All right.

MR. THAU: I think it's logical.

THE COURT: Fair enough. I get you. Now, that is really it, isn't it?

MR. THAU: Yes, on the question of consent, certainly.

THE COURT: Let me hear you on probable cause. Let's assume there was no valid consent as to the car. How about this? The agents knew they were looking for men who had been on the lam, as they understood it, at least, for quite some time. They also had warrants for their arrest, but they didn't have either the warrant or certified copies thereof with them, as they told it.

They also believed that the only practical thing they could do was go before a United States Magistrate, the closestof whom, and even this by coincidence at the moment, would have been in Garden City or Mineola. More like at 225 Cadman Plaza in the Borough of Churches, New York, Brooklyn.

Now, you would argue they could go before a State Magistrate?

MR. THAU: That's correct.

THE COURT: Technically you are right, but the agents

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didn't have that in mind. They believed they could only go to a United States Judge or Magistrate.

MR. THAU: I beg your pardon, your Honor. I asked one of the witnesses whether he was aware that State laws had been violated, assuming, of course, that Federal ones had also.

THE COURT: Yes. The agents aren't paid to think about first State laws, and one of the agents also said, and he is quite right, that if you get a fellow on a putative Federal rap, particularly in a State like New York, the odds are there is some State Statute which would be violated into the bargain, and he is right. That is a practical matter, and I see your point, but they weren't thinking in those terms. They were thinking of pursuing a Federal investigation. They were working for a case agent who is here in Manhattan, and they were concerned about their instructions to find the fugitives.

MR. THAU: Your Honor, the only contraband that that trunk might have contained, since they were looking for fugitives, were the fugitives themselves.

THE COUT: No, no, I don't believe that. Remember this, McMullen said that after he got the keys from Mary Hammer on her husband's request to her that she turn them over that he went out. It's true he had the keys in hand, and you and I can say that, well, he intended to open those doors and

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the trunk come hell or high water, and I think probably that might be right.

But before he breaks this cover of that car, so to speak, that is, he opens any doors or trunks, he looks in the windows, and there he sees indicia of recent use and occupation of that car, if you will, a half filled cup of coffee, scraps of food from either McDonalds or some competitor of that great establishment; objects of personal clothing of a male person.

And he thinks of two real obvious possibilities. One, as you say, maybe they are hiding in the car, although I think that is a little unlikely. More likely he thought, "Gee, if I just look around here, I will get some clues where they are. Maybe they are right here in the vicinity, maybe they are somewhere else, but I will get a clue from something to be found in the car." Gasoline bills might have given the clue. McMullen gave us the hint -- had they been in such places as the celebrated city of Las Vegas and so on. It's all perfectly realistic.

Again, you see, we Judge and lawyers have these naive little notions as to what the real world is like, and is always bothersome in these Fourth Amendment proceedings, because I don't think our notions are compatible with the truth.

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But be that as it may, your point is there was no probable cause to search that car?

MR. THAU: That's right. It was investigative purpose, solely suspicious. None whatever. They didn't even know there were documents involved in the case.

THE COURT: That's right. They admitted that. They were very candid.

I might say that both these agents deserve a small commendation, and these days when everybody criticizes everybody, including the FBI, and they were about as candid a pair as I can recall, and they are too intelligent not to know that some of their answers might create problems for the prosecution. They came through with them lustily and loudly, and for that I salute those two men.

I might say, incidentally, that I believe your client too, in some significant respects. That may come as a shock to you and him, but I do.

MR. THAU: Not to me. I am accustomed to having my clients believed, your Honor.

THE COURT: Don't hold your breath on that, but I am saying here I believe him on a couple of scores that are important. What do you say, Mr. Bush, now you know what the defense contends?

MR. BUSH: The Government's position is much as it

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appears in the memorandum which was submitted.

First, relying on the Brown Case, the Government will contend that the defendant really hasn't met the criteria of Brown with respect to establishing standing.

To begin with, I don't believe it's challenged that he was not in the premises on the day in question.

Secondly, at least with respect to the items seized that the Government plans to introduce into evidence, there can be and is no claim that, at least by him, he had any ownership independent in the items, directly or indirectly.

Thirdly, the fact that he was allowed from time to time to use the car of Gradowski, and even if the Court finds that, as he testified, he used it perhaps as much as fifty to sixty percent of the time, that would not, the Government contends, give him the proprietary or possessory interest that the Court in Brown had in mind.

It would seem that his position would be no different than any other person's position that might have temporary possession of that car, and as soon as temporary is relinquished that he would lose whatever rights to standing he had as considered by Brown.

He does not make a contention that makes much sense that he actually owned the car.

THE COURT: Let me stop you right there. To add to

what you are saying, I think you mean the following, that the key allegations in this indictment deal with four transactions if you will. I may be using that somewhat in a loose sense, but four usages of bank documents, checks, other records and so on, that occurred in early December of 1972, in respect to which transactions the documents which are the subject of this motion, there is no overlap at all, right?

MR. BUSH: As far as the possessory interest, no, of course the documents we claim to introduce have evidentiary value, but there is no possessory --

THE COURT: Yes, but as part of those transactions, these are not these particular documents here?

MR. BUSH: That's correct, your Honor.

THE COURT: That is something which came up as of some consequence to the Brown Court, correct?

MR. BUSH: That's correct.

THE COURT: All right. I certainly agree with you that it is a very, very close question under the teaching of Brown as to whether there is a requisite standing, notwithstanding that in a loose sense, at least, the Court could conclude, if he believes Mr. Nash in certain respects, as this particular Judge does, by the way, that there was, you could say, in the broad sense, he is a personaggrieved, or putatively, that he has at least prima facie standing to raise

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his contentions as he does here.

But under the teaching of Brown, that may not be enough, particularly since he disclaims any possessory or ownership interest in the line of documents which you intend to use which come out of Government's Exhibit 3, as we note in our hearing.

MR. BUSH: That's correct.

THE COURT: What do you say about this argument of consent? You know that I feel that there was no valid legal consent by the Hammers to the search of their home and castle.

MR. BUSH: Well, the Government's position on consent is that there was valid consent with respect to the search of the car, and I think that there are a number of factors that indicate that.

While the Hammers may not have been too pleased to have the FBI into their house, they certainly evidenced a different feeling with respect to the car.

THE COURT: Say no more. I got you there. There is some evidence post the actual search which tends to corroborate that.

MR. BUSH: Both the giving of the keys and insisting that the agents keep the keys and the fact that the car was then moved off after the search.

THE COURT: Right, I understand that.

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MR. BUSH: The Government would also direct the Court's attention to the recent case of Bustamonte where it discusses the issue of advising people whether they have the right to refuse consent as affecting consent issue, a Supreme Court case decided within the last two months, I believe.

Finally, with respect to probable cause, the Government's position is this, that it would appear that there may not have been probable cause to search the car with respect to finding contraband or other items of that nature which the agents expected to find when they arrived on the scene. I don't believe either that the FBI agents actually testified that they began their search of the car with a view in mind towards finding evidence that would relate to the actual commission of the crime or contraband tying into the commission of the crime.

THE COURT: That's right, they were very frank about that.

MR. BUSH: However, the Government would call the Court's attention to United States against Ellis where the Court of Appeals for the Second Circuit considered a very similar type of issue that this Court is now presented with, and at least in part the Court seemed to indicate that it would justify a warrantless search if the agents had probable cause to believe that they would discover evidence which would

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lead them to the whereabouts of a fugitive.

THE COURT: That is the point I was trying to get Mr. Roland Thau to respond to, because I believe that the law does permit a search, particularly of a vehicle. To me a vehicle is a very distinctive fact as opposed to a home, for example, or an office.

But I understand your point there. All right. What it boils down to is this: You still say that under Brown in particular, and given the facts here, that there is not enough to show that there is the requisite standing. In fact, I think you would go so far as to say to a substantial extent, Brown has undercut the holding of Jones.

MR. BUSH: I believe that is so.

THE COURT: All right, perhaps that is an unfair corner to back you into but --

MR. BUSH: At least to the degree where the case did not involve possession at the time items were seized as being part of the crime.

THE COURT: All right. So you would say in either Count, even if the Court, however, does disagree with you and say that Mr. Nash does have requisite standing, that nevertheless it doesn't make any difference; there was a valid consent for the search of the automobile, and furthermore, even if the Court were not to accept that as being a valid consent by

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Mr. and Mrs. Hammer, that there was probable cause to search, as the agents clearly had in mind the car to obtain clues which might help them locate the fugitives.

MR. BUSH: That's correct, your Honor.

THE COURT: So you have really three separate strings to your bow.

MR. BUSH: That is the Government's position exactly.

THE COURT: Decision will be reserved. We will adjourn until tomorrow morning at 10:00 o'clock, at which time I will utter my findings and conclusions on the issue and then we will pick a jury.

[Matter adjourned to July 17, 1973 at 10:00 a.m.]

United States of America

-v- 73 Cr. 610

Richard Nash and Peter Gradowski

New York, New York
July 71, 1973--10:00 a.m.

MR. THAU: Your Honor, if I might, before the Court announces the Court's decision on the motion to suppress, I would like to apprise the Court that a few mintues ago this morning Mr. Nash informed me that it was his desire to proceed pro se until such time as counsel Gene Condon, with whom he has been in contact, can arrive in court. She is expected to be here probably within the hour. Is that correct?

MR. NASH: Yes.

MR. THAU: So that while in fact Mr. Nash tells me that he will be represented by counsel, the reason we speak of pro se is that the defendant, who will carry on pro se, so that the Court won't waste time until the arrival of Miss Condon.

May I say about Miss Condon that she is an attorney with whom the defendant has consulted on this case. I have met her. We have spoke to defendant together, so it's not one of these late arrivals who will know nothing about the case. I believe she has met with the prosecutor in connection

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with this case as well.

THE COURT: Let me see if I understand. Are you saying that the defendant at this time has decided he wants to dispense with your services and have this lawyer come in at the eleventh hour and take over?

MR. THAU: That's right, your Honor.

THE COURT: Is that correct, Mr. Nash?

MR. NASH: Your Honor, first I would like to say I sent a letter to the Court notifying the Court. I have a copy of it here. I don't know if the Court received one.

THE COURT: I don't have any such letter. I am sorry. The mails are not always very fast these days. When did you send it?

MR. NASH: I sent this on July 7th.

THE COURT: Well, it's new to me. I never received it.

MR. NASH: Would you like to see it? My reason for sending it was my last appearance in court for about ten days was to make any motions I wanted to make.

THE COURT: This doesn't say anything about a lawyer.

MR. NASH: No. Well, I have that here. I want to go pro se. If necessary I want to waive my right to counsel. I feel that there are pre-trial motions I want to make --

THE COURT: Now, look --

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MR. NASH: I can't make myself understood to my present counsel apparently. I feel that my case is prejudiced by having -- being tried with Gradowski when he is not here. I believe that on my first indictment, I want to know if there was additional evidence to support a superseding indictment. I wanted minutes of my appearance before the Grand Jury. I wasn't able to obtain them.

There are many things I wanted done in this case before I reached this point, and none of it's been done, as far as I can ascertain, so I feel I am better representing myself if I can't get private counsel.

THE COURT: You have been represented by Mr. Thau in a motion that was made yesterday that was prima facie a very good and important motion, so I don't quite --

MR. NASH: I understand it was a good motion, it was an important motion, it was a motion that -- one of the motions I wanted made.

THE COURT: Let's disentangle ourselves here a little bit. I do not think that you should fail to understand me when I tell you the following:

Number one, you should be represented by a lawyer. You are an intelligent man. I know that from my brief dealings with you, but I don't care how intelligent you are, and I don't care how many previous times you have had brushes with

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the law courts in this and other cases. You still have to have a lawyer. You are entitled to a lawyer under the Constitution and the laws of this country, and I think that you ought to be very cautious about proceeding without the benefit of a lawyer.

Second of all, I never heard of this other lawyer named Condon. I don't know who he or she is. I don't know what to expect, because she isn't even here. Where is she?

MR. NASH: There are reasons, there are various reasons why you haven't heard of Miss Condon. There was a question since the beginning of this, which the prosecution is aware of, and there was a question of who was going to represent me, and why Miss Condon might or might not represent me.

THE COURT: Are you telling me that she is willing to come in here this morning?

MR. NASH: I spoke to her this morning. This I prepared last night not know she would be here. I got in touch with her this morning, and she said she is coming down.

THE COURT: You tell me also that so far as you know she is prepared to step in and represent you at this trial?

MR. NASH: Yes.

THE COURT: I tell you what we will do. Here we are confronted with this situation which, at least as far as

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I am concerned, is a total surprise; but be that as it may, we will go ahead. I will ask Mr. Roland Thau to sit by you, continue to represent you, consult with you, until this lady arrives, but when can we expect the lady?

MR. NASH: She told me she'd be down here this morning. She is speaking with somebody in her office right now.

THE COURT: Is her office here in Manhattan?

MR. NASH: Yes, it's on West 11th Street. I would like to go on second call if possible to give her a chance to get here.

THE COURT: Mr. Thau and you were here yesterday when all the evidence came in on this motion, and I am going to rule on that motion. I don't have to wait for some lady that I never heard of.

MR. NASH: I wasn't asking --

THE COURT: As to the trial, that is something else again. If we are going to go forward with the trial, I will be willing to consider it, but I would like to be told when she is expected to arrive. I have never heard of such goings on. She purports to be a lawyer, and here just kind of cavalierly comes down and --

MR. NASH: It's not her action that's cavalier in this case.

THE COURT: Perhaps not. What is the problem?

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MR. NASH: The problem is that there are facts outside of this court which kept her from being here and due to the fact of I was informed and she was informed that a target of the investigation was a colleague of hers, and that would make it fairly hard for her to represent me, because the colleague had also represented me at one time.

All this had to be settled, and I have spent three months now in jail, and all of a sudden there is this rush for me to get me a speedy trial, and my speedy trial, I felt the presecution went through great pains to deny me a preliminary hearing.

THE COURT: I don't understand that.

MR. NASH: They come up with this catchall conspiracy charge which, you know, is the lazy man's way of getting anybody indicted. I could probably indict him on a conspiracy.

THE COURT: Wait, Mr. Nash, please. Many are the people, usually defendants, who claim that conspiracy is a monstrous affair. The law allows conspiracy charges. Maybe there is nothing to them, but that is the whole point of a trial. You have been in jail, as you and I know --

MR. NASH: Excuse me, your Honor, you and I also know that in Southern District it's almost unheard of for a preliminary hearing down here, that everybody gets indicted before their preliminary hearing, and then we have the super-

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seding indictment when the prosecution is actually ready with their case, and the defendant hasn't had a chance.

I feel I have been denied my preliminary hearing, and I feel that the prosecution did it deliberately just by giving me this red herring indictment on a conspiracy and a bank larceny charge which they superseded.

THE COURT: Whatever you and I may think of such superseders, they are premitted, and here as I see it, the changes in the indictment are sufficiently minimal as not to make it of any practical consequence.

But be that as it may, these are not matters before the house. We have been struggling to give you a trial, because that is what you say you want, and you are entitled to it.

MR. NASH: Your Honor, what I am saying is I feel these matters should have been brought before the house. I want my pre-trial.

THE COURT: Now they are before the house.

MR. NASH: I wanted my pre-trial rights and procedure Now I am going directly from an indictment to a suppression hearing to selecting a jury.

THE COURT: It happens more often than not in my experience. A preliminary hearing at this point would be of no consequence whatsoever as far as I can tell.

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MR. NASH: I feel that evidence that was presented to the Grand Jury on the first indictment, I feel they were properly presented with evidence. I feel also that they are to be presented with additional evidence when they get a superseding indictment.

THE COURT: Maybe they were. How do you know they weren't?

MR. NASH: I would like to find out, and I don't want to find out in the middle of a trial. I need a chance to defend myself.

THE COURT: It is not my idea, Mr. Nash, that you suddenly change lawyers. That is one of the points.

MR. NASH: It's not sudden, your Honor. Yesterday you told me to be calm --

THE COURT: It's sudden as far as I am concerned.

MR. NASH: You told me to be calm.

THE COURT: I surely did, because you were getting good representation, and there was no reason that you had to blurt out things which were your private business, and I wanted to shut you up.

MR. NASH: Well, private business apparently can't be kept out of the court, because I can't get done what I want done. I want assistance on my defense.

THE COURT: You got very good assistance yesterday.

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MR. NASH: I don't want him to say, "This is what is going to happen to you, Nash, and this is how you are going to get your time." I don't want to hear this.

MR. THAU: Am I being quoted?

MR. NASH: You are not being quoted.

THE COURT: Mr. Nash, I don't want to get into a wrangle with you, but I also want you to know two things. I repeat:

You have got to have a lawyer to represent you. It is possible under the law for a person in your situation to waive the right to a lawyer, but I am not about to permit that waiver to allow you to appear in this case pro se. That is rediculous.

MR. NASH: I really don't want to do that, your Honor.

THE COURT: I gather that.

MR. NASH: I am not capable of defending myself in this.

THE COURT: Well, fine, but now we are at this point, and I don't propose to do anything but what I said.

First of all, we are going ahead so that this Court can render its decision on the motion to suppress, which I, at least, regard as important, and I only hope that you do too.

Mr. Thau will be available to you. I would like to

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ask you one more time, do you have any indication when this Miss or Mrs. Condon or whatever her name is will be here?

MR. NASH: She is expected here before noon.

THE COURT: I don't think that is very fair. I don't think I have any reason to sit around here and be told that at the eleventh hour, with a jury panel waiting, and that she can proceed this way or that you can proceed in that way. That is monstrously unfair to everybody.

MR. NASH: I don't think it was very fair of the prosecution to let me know that a colleague of hers is a target of the investigation, and this --

THE COURT: I don't know what you are talking about.

MR. NASH: You don't know what I am talking about. This is what I am saying. The Court doesn't know what is going on, and I am not allowed to present anything to the Court and inform the Court --

THE COURT: Wait a minute, Mr. Nash. You keep claiming that some unknown person, I guess it must be this man Cohen, right? Is that who you are talking about?

MR. NASH: This is what I say, yes.

THE COURT: If Cohen is the target of an investigation, that is the problem of the prosecutorial arm. I don't know what you are talking about. There is nobody that says that you have to retain a lawyer who is being prosecuted.

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MR. NASH: No, my lawyer is not being prosecuted. My lawyer happens to be a colleague of Cohen's.

If my lawyer is called to testify in the case of Cohen, how can my lawyer represent me? This was my major problem.

THE COURT: That is a problem of your doing. I don't understand.

MR. NASH: I think it's a problem of the prosecution doing, not mine.

THE COURT: I am sorry, I disagree. This Court was advised, and it is a matter of formal record, that the Legal Aid Society Defender Unit was representing you in this case. You are the one who injected all this into the record. I had no reason to know that, and I am getting a little tired of these red herrings which are being dropped around by various people in this case.

What we are going to do is proceed, and I will reserve on whether or not I will allow this unknown lawyer by the name of Condon to waltz in here hours from now at her own whim and caprice and represent you.

I think this Court is being put upon, and I am concluding that we have no choice but to go ahead, at least to the point of allowing the Court to rule on your motion which after a few false starts, was finally presented in a profes-

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sional way, and it presents real issues, which I am about to rule on without further interruption from you or anybody else.

All right, gentlemen, you stay where you are, Mr. Thau. You are not relieved in this case despite the fact that you brought to my attention what you brought to my attention...

Yesterday, after considerable difficulties we finally got down to a presentation of evidence in a somewhat unusual motion to suppress evidence on behalf of Richard Nash. I might say, by way of preliminary, I think what happened here was that Mr. Bush was not really notified precisely the thrust of the defense motion until perhaps Friday of last week, and even then I surmise he wasn't told clearly what was involved.

I say that without any spirit or intension to criticize either Nash or Roland Thau, but only to illustrate what I think was our problem in the early going yesterday in this hearing.

However, once we got down to it, and once we got a full thrust of what the evidence was, I think we had some significant problems presented by this motion.

Basically, the motion amounts to this: Richard Nash, admitting that he is not the legal owner of the 1968 Cadillac Convertible which was then colored green and located on the premises of his sister, Mrs. Mary Hammer, at 41 Beach Street,

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South Beach, County of Suffolk, Long Island, New York, on April 13. On that day, as everybody concedes, two agents of the Federal Bureau of Investigation, along with two or three detectives of the County Police of Suffolk County were at the home of Mrs. Hammer, and finally, after certain events to be determined here in a moment, a search was conducted of the Cadillac automobile which was registered in the name of the co-defendant in this case, Peter Gradowski, on that day and at all times pertinent hereto.

As a result of that search, there were found in the trunk various documents which are here in evidence as Government's 3 for Identification which the Government apparently intends to use in an evidentiary way at the trial of the defendant Nash, and, if he is ever caught, I presume perhaps the defendant Gradowski.

In addition, the agents found in the trunk certain other materials which have been broken down and compartmentalized, as it were, for the purposes of our motion to suppress as Government's Exhibit 4 for Identification.

This Court makes the following findings:

In April, on or about April 13, 1973 the FBI had been looking for the defendants Richard Nash and Peter Gradowski for at least a period of some three months, if not more. In the parlance of law enforcement officers, both

Mr. Nash and Mr. Gradowski were fugitives as far as the Bureau was concerned.

On April 13th, two agents of the FBI, Anthony Scuder and Richard McMullen, who were out of a Suffolk County sub-office of the Bureau, were engaged in the task of following a lead as to the whereabouts of Gradowski and Nash. At that time the agents were aware that the sister and brother-in-law of Richard Nash lived at 41 Beach Street in Sound Beach, New York. Indeed, the agents had been to see the Hammers, Mrs. Hammer being the sister of Richard Nash, earlier that year, specifically on or about February 6th.

Sometime after lunch on the 13th, the agents arrived in an automobile at the home of Mr. and Mrs. Hammer, and observed as they pulled in that there was this 1968 green Cadillac parked in the back of the property.

As they got out of their car, George Hammer approach with a dog on a leash. The agents asked George if he would be willing to be subject to an interview with them, and in substance George, and later his wife, Mary Hammer, replied that they were not going to have any interview because they had consulted with some unnamed attorney, and as a result of their consultations, they declined to have an interview about the fugitives' case.

At that time, when asked as to what the Cadillac

was and to whom it belonged, George contented himself with saying to belonged to a friend. Obviously, the agents then did what one would expect. They took down the license number and tried unsuccessfully to reach the New York office of the Bureau or alternatively the Suffolk County office of the Bureau by radio to get a New York State identification check of the license plate.

When that was not successful, they drove to the Town of Coram, New York, to a Precinct -- I think the 6th Precinct of the Suffolk County Police -- and there they made calls to the New York Identification Bureau and ascertained that the Cadillac was registered in the name of one of the fugitives, Peter Gradowski.

That information, of course, whetted their interest in the situation considerably, and they were accompanied, by their request, back to the Hammer's residence at Sound Beach.

Once again agents Scuderi and McMullen were greeted by George Hammer, and when they brought to his attention that they had found out that the car belonged to Peter Gradowski, they asked him in effect why he hadn't told them that, and his answer was that he assumed they knew it in any event.

The agents then asked permission to search the home of the Hammers to see whether or not they could locate one or both of the fugitives. At this point I note parenthetically

but importantly that the agents had no task nor did they have any intention to seek contraband or, indeed, even evidence of the crimes which allegedly the two fugitives were being sought for. Their mission, because the case agents were here in New York, was simply to locate one or both of the fugitives if they could, or to obtain evidence as to the whereabouts of the fugitives, one or both.

Therefore, they talked to Mr. and Mrs. Hammer again and asked to search the house, as I said.

Either George or Mary asked if they had a search warrant, and they said that they did not. In point of fact that was correct. They did, however, but did not have in their possession, arrest warrants for both Nash and Gradowski.

At that point, apparently, Agent McMullen explained his version of the law which in his judgment explained why they did not need a search warrant for the house, and it is plain also that both McMullen and Scuderi at this and other points on April 13th mentioned the Harboring of Fugitives Act, as it is sometimes simplistically called, and apparently explained to the Hammers that they could be accused of a s separate crime of harboring a fugitive from Federal justice.

Apparently because of this explanation, which McMullen gave, which I am not satisfied comported with the law, the Hammers then said that they had no objection to the search

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of the home.

The search of the home, which was a walk-through search, consisting of opening up doors and the agents peering in closets and behind other open doors in various rooms from top to bottom of the house, of course revealed neither the two fugitives or any evidence that they had been there.

When that was completed, McMullen apparently asked George Hammer how it was that he had gotten the Cadillac on his premises. George replied in substance that the evening before, April 12, 1973, a male had phoned, called himself Jack, and asked if he could bring the Cadillac to the premises and said that he had Gradowski's permission to store the car there so long as the Hammers were agreeable.

Apparently George said that that was all right, and later in the evening, according to George, this white male in his forties known as Jack brought the car over and turned the keys over to him, George, and left.

McMullen then asked George for permission to search the car. George then turned to his wife Mary, and asked her to get the keys, which she did.

I further find that the Hammers at this point were more than ready to turn over the keys and did so with alacrity.

Armed with the keys, McMullen then went to the vicinity of the automobile. At this point it appears that

Scuderi and the Suffolk County detectives left the scene, apparently because the detectives had told Scuderi of an adjacent or nearby residence where perhaps one of the fugitives I think most particularly Gradowski, was known to have frequented before.

That left McMullen alone for the search of the automobile. McMullen first approached the automobile, aand as he easily could, looked into the interior. The interior of the automobile is or was on that day and at that time interesting, particularly the back seat thereof. In the back there was a bedroll, articles of men's clothing, articles of food, some of which was half eaten, and indeed even a partially filled cup of coffee.

After looking into the car but before penetrating the car by use of a key or otherwise, McMullen then backed off, went around to the trunk, opened the trunk with a key, and removed the documents from the trunk which are the subject of this motion to suppress.

While McMullen was removing some documents, most of which were found in a typical dark red or perhaps reddish brown manila folder, Scuderi and the police returned. They all joined at the car, and apparently George and Mary were there too, and the agents showed George and Mary what they were taking from the back of the trunk.

At that point George asked Agents McMullen and Scuderi that they take the keys. Indeed, he added that he wished they'd take the car itself. He explained that he had had trouble with all of this situation, that he had really not wanted to be involved, and he was well anxious to be rid of the headache of the 1968 green Cadillac.

The story isn't quite over, because on April 13th Scuderi gave a written receipt to Mr. and Mrs. Hammer for the keys to the Cadillac. Subsequently, at the request of George Hammer and on or about April 27, Mr. Scuderi returned the keys to the Hammers.

It also appears that on that day the car was removed to the premises of the mother of Mr. Peter Gradowski on Yaphank Road, which I gather is in or near the Town of Sound Beach.

In part, all of this came about, as I understand the evidence, because the agents made clear to the Hammers that they had no right, or at least they did not think they had any right, to take custody of the car, and it was because of this in large measure, if not entirely, that the keys were returned to Mr. Hammer so that he could take steps of his own to get this Cadillac off his premises and out from the responsibility of him and his wife.

I have already indicated that there is no reason to

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disbelieve any of the essential testimony of the agents. Indeed, I have indicated far more so than frequently is the case in these hearings, these agents I thought were excessively truthful in the sense that they told the truth even when they must have know that some of it might not make the prosecution's burden any easier.

But this is not all of the evidence in the case. After this Court had rather pointedly made certain observations the defendant Nash took the stand and testified, as he certainly is entitled to, and in significant measure I believe testified truthfully.

In sum, it is the burden of Mr. Nash's testimony that although he concedes, of course, that Gradowski is the legal owner of the Cadillac, he recited a long-time friendship with Peter Gradowski, a long-time practical or informal usage of Gradowski's car. Indeed, according to Nash Gradowski is somewhat less than an efficient driver of automobiles, and partly for that reason a good deal of the time, according to Nash, he drove this automobile.

He had a set of keys. According to him, there are four sets of keys to this automobile, one in his possession at all times, one in Gradowski's possession. The other I think he said was in the possession of Gradowski's mother, and he couldn't account for the fourth set.

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While it may be that Nash was erroneous when he testified that in his judgment he used this car about sixty to seventy percent of the time, I have no doubt that he used this car a good deal of the time, and it would seem quite clear that he had the unspoken or spoken permission of Gradowski to use it here in the City of New York, and in some of their odysseys up and down the East Coast and perhaps out to the far west.

On the other hand, Nash disclaimed any and all present or past possessory or legal interest or title in the contents of the documents which we know in this hearing as Government's 3 for Identification. However, he did claim ownership, and I am sure he is correct about this as well, of a portion of the contents of what we know in this hearing as Government's 4 for Identification, including an identification card, something akin to a union card, and a few other matters which were not always in the name Richard Nash but were in a name, George Freedie, which he apparently used on other occasions including even during a sojourn in what is known as the Queens House of Detention of the City of New York.

But significantly from the legal point of view perhaps, he makes no claim of any interest on April 13, 1973, or not at any other time to those documents which the

Government seeks to use apparently in the trial for evidentiar purposes.

It is also clear that none of those documents which are marked for identification here as Government's 3 had anything to do with the actual substantive charges recited in the indictment which the Government proposes to take to trial against Richard Nash.

Significantly and briefly, those documents, records, really relate to purported transactions in early December of 1972. So far as I can see, none of the documents contained in Government's 3 here have any particular date reference whatsoever. They are mostly blank records, blank checks and the like.

By way of ultimate findings or ultimate determinatio of fact and conclusions of law, I set forth the following:

There are a number of issues in this case. The first issue, of course, is whether or not the defendant Nash has standing to move to suppress anything found in the trunk of that Cadillac on April 13, 1973. This is a very close and difficult issue.

Second, there is the issue as to whether or not, assuming Nash has the requisite standing, he has a sufficient possessory interest which would entitle him to prevail on any kind of suppression motion. You can argue that that is nothin

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more than a restatement of the first issue, but I am not clear that it is, given the commends of the Fourth Amendment and those of Rule 41, which may not be co-extensive.

There is also the issue, if you assume Mr. Nash does have standing, was there a valid consent to the search of this automobile given by the custodians thereof, Mr. and Mrs. George Hammer.

Still further there is the issue, if you assume that Nash has standing, and if you assume further that there was no valid consent to the search of the automobile given by the Hammers, was there probable cause for the warrantless search of the automobile.

I turn to the standing question. The Government's arguments on standing are extemely persuasive in many respects and through no fault of the Government or its counsel, however, there still are problems. I have already found that Nash is substantially correct when he says that he had some kind of a gratuitous permission to use the Gradowski car on his own, pretty much on a free basis on significant periods of time. I also believe Nash when he testified that, instead of the so-called Jack calling his sister's home on the evening of April 12th the caller was none other than that white male known as our defendant, Mr. Richard Nash.

I think Nash is correct. I think the Hammers were

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not telling the truth when they gave that story. I don't fault them, in human terms, for that. I surmise that with all the difficulties and problems over the years, that nevertheless Mary Hammer is a devoted and loyal sister of her brother, and that is only natural.

Furthermore, I surmise that George, like a lot of brothers-in-law, might have thought to himself a couple of times that he would like to get rid of this scruffy brother-in-law with all his problems, but he probably likes him, and besides, he loves his sister, and that is that.

So I don't want to have the Hammers think I misunderstand their motives, and they are perfectly human and plausibl but what they told these agents wasn't the truth, they know it, and so do the agents.

The fact of the matter is, therefore, that it was Richard Nash who turned over the keys to his sister and brother-in-law and gave them custody of that car and left.

Therefore, in my judgment as a practical and legal and factual matter, they had every right to make a determination as to whether or not to allow somebody like some FBI agents to search that car, but that doesn't answer the standing problem.

You can say, to use the articulation of Rule 41, that under the circumstances of this case Richard Nash could be

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viewed as one aggrieved. Certainly he had practical dominion and control of that car as already found; at least, the night before he did, and it is he, apparently who turned this car over.

Unfortunately, however, I cannot conclude from that alone that he has the requisite standing under the Fourth Amendment. In trying to reconcile the long line of cases beginning not too far back with United States against Jones, continuing down to the spring in the Supreme Court's latest declaration that I know of in a case somewhat relevant here, United States against Brown which was decided on April 18th of this year, I have considerable difficulty in being sure that the Courts really think that the Fourth Amendment and Rule 41 are exactly co-extensive.

In other words, this wasn't Richard Nash's home or his castle, and even if you assume that he had some dominion over the car, he wasn't there when the search was conducted, and he had given full control of that car to others.

Not only that, he has stoutly maintained on the witness stand and elsewhere that he made no claim of any right, title, interest, possessory or otherwise, in the significant objects which are the objects of this motion to suppress.

Not only that, I must note that he and the Government

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would have to agree that none of these items, that is, those items which are crucial here, the items contained in Government's 3 for Identification, are items which are directly related to any possible proof of the substantive Counts and transactions which are obviously the subject of both the original and superseding indictment in this case.

Therefore, although the matter is not free from doubt, in relying in part on the teaching of United States against Brown, I conclude that Mr. Nash probably does not have the requisite standing to make this motion. However, recognizing that the matter is not free from doubt, and there are few search and seizure matters that are, really, I turn to the further conclusions so that in case it becomes important, any reviewing Court will have the benefit of the final determinations and findings of this Court.

I turn to the question of whether or not, assuming Nash had standing, his sister and brother-in-law gave a valid consent to this warrantless search by McMullen. The argument has been made quite understandably and properly that since this Court has already indicated that it does not think that the Hammers gave a valid consent to the search of their home, and I adhere to that conclusion, by the bye, that that improper search permeated or tainted what happened thereafter.

That is a perfectly understandable argument, because

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no matter how you slice it, the search of the automobile had to happen very promptly after the conclusion of the search of the house. I think one of the agents testified that though he could not be sure, he was quite certain that the search had to have taken place within the next thirty minutes, that is, within thirty minutes after the conclusion of the house search, and I will accept that.

However, I do not think that I can conclude that the illegality of the house search tainted the search of the car. First of all, I note the obvious, that a car and a home are quite different animals within the purview of the Fourth Amendment to our Constitution.

Second of all, I note that, if you analyze what the Hammers said, both before the search was actually conducted of the car and after, that they having been given full custody of the car, were very anxious to have the search of the car conducted and have the car gotten off their hands, and I for one don't blame them. They were doing their best to protect Richard Nash, but blood can only be stretched so far, and the ties of relationship by marriage can only be stretched a little less far.

Therefore, I think that it is important to keep those circumstances in mind. I also think it's important to keep in mind the nature of this automobile. I also think it

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is important to keep in mind that here the agents made no statements as to the law and did nothing to mislead the Hammers on that score.

It is true that there is no testimony that either one of the agents said in substance to the Hammers that they had the right to not consent to the search. On the other hand I think that circumstance or fact does not negate the reasonableness of concluding that the Hammers for every good reason wanted to consent to that search, hoping to get rid of the FBI agents and the car in one fell swoop as a result thereof.

There is the problem of a warrantless search. Many Courts in this Circuit and otherwise, as you know, start out with the presumption that a warrantless search is illegal. Accepting that as a proper formulation, we then come to this: The agents were there not seeking evidence, not seeking contraband of a crime. They were looking for men who, so far as they knew, had been fugitives for weeks and indeed months. They had every reason to know that they were hot on the trail of something, namely, a car registered in Gradowski's name. They were in the home premises of the sister of Richard Nash, the other fugitive.

A car is something that can be moved quickly, particularly by a competent and desperate man. They knew that the Hammers were very reluctant to talk, and by that time they

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knew the Hammers were willing to tell a few little fibs in order to protect their brother and brother-in-law.

Therefore, they also knew that if they left the premises to get a warrant, that even if they were to use the County Police to block off the roads, that it was still very possible that a desperate man or men could extricate themselves through some kind of slip or breach in the net.

Furthermore, I think that one cannot ignore what Mr. McMullen saw when he approached the car. I have already found that he looked before he touched. He looked before he breached the outer confines, if you will, of this automobile, and that in my judgment only increased the picture of reasonableness of proceeding to search without a warrant.

The food, the half filled cup of coffee, the bedroll, the clothes, were an indicator that the car had been used as a place to sleep, and recently. In other words, any halfway alive law enforcement officer would necessarily lean to the surmise that there was evidence of the whereabouts and the immediate whereabouts of the fugitives.

Therefore, I hold that, notwithstanding that this was a warrantless search, there was every reason to search the car without a warrant under the then pertaining circumstances. Put differently, that there was probable cause, as the lawyers and the Judges like to put it, for the search of

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this car without a warrant. Therefore, on these conclusions and findings, the motion to suppress is denied.

My next question is that I don't see anybody new in the courtroom. Do you think that Mrs. Condon has arrived?

MR. THAU: Your Honor, I just inquired of Mr. Nash whether he told her the room number. I doubt whether he did. Did you tell her?

MR. NASH: No, I didn't.

MR. THAU: There is a possibility she may be in the pens. Do you have a number for the lady?

MR. NASH: Yes, I do, your Honor.

THE COURT: At her office?

MR. NASH: Yes, I do.

THE COURT: What I am going to do is take a recess and ask Mr. Thau as an Officer of the Court if he would be good enough to take that number and call the lady's office and see what the circumstances are. Then we will get that report and I will decide what to do.

Before we disperse for this recess and so on, is there any misstatement of an obvious nature that either of you caught in my findings and conclusions?

MR. BUSH: Let me just clarify one thing. I don't believe it was a misstatement, but I want to be entirely open so far as the Government's position on the evidence it plans

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to use.

In large part that evidence is composed of blank checks, blank deposit slips, and so forth. In part, however, it is also composed of deposit slips that apparently were processed through banks, bills from different secretarial services, and so on and so forth, so it is not entirely blank items.

THE COURT: I accept that correction. The point I was making when I said was that none of those apparently completed documents, i.e., non-blank documents, relate to the transactions directly which are the subject of this indictment.

MR. BUSH: Perhaps I should clarify that as well. I am not sure exactly what the Court means by that, but perhaps I can explain what the documents are.

THE COURT: They are not the documents which underlie the Counts which are substantive Counts?

MR. BUSH: No, they are not the documents that the defendant actually is accused of possessing. Of course, they do bear evidence and do relate to those documents.

THE COURT: No, I understand that part, but the distinction that I was trying to make is they are not the documents, for example, that underpin Counts 1, 2, 3, and 4.

MR. BUSH: No, they aren't the Counts that the defendant is actually accused of possession.

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THE COURT: That is the only distinction I intended making.

MR. BUSH: Naturally, we do intend to introduce them because they do bear evidence.

MR. THAU: I have no additions.

THE COURT: All right. I might say that when we finally got into it, gentlemen, that you raised some interesting arguments and -- let me put it this way -- it was far more interesting and intricate than a lot of these suppression motions are, and you, I think, got down to it, for which I salute you.

Now we will take a recess so that this lady lawyer can be called, and then we will return.

MR. NASH: Your Honor, excuse me, did you say if I had any comments about what you had said during your decision?

THE COURT: Any comments? I don't know what you mean. I am sure you don't like it.

MR. NASH: No, it's not I don't like it. I thought it was pretty cool actually.

THE COURT: Wait a minute. Don't go too far the other way. Let me explain to you --

MR. NASH: I got most of what I contended in it.

THE COURT: You should realize that under Federal law you have an exception to this ruling of the Judge, you see

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so that you can raise it on appeal if need be. In the event you are ever convicted, you can raise this issue that I just resolved on appeal.

MR. NASH: Do I take exception now?

THE COURT: You don't have to. You have that exception noted for you in effect by Federal law. I should tell you that so you don't have to worry about it.

All right, let's check on this lady and see what we can find out.

[Recess]

* * * *

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CHARGE OF THE COURT

(HAROLD R. TYLER, DISTRICT JUDGE.)

THE COURT: Mr. Evans-Bey and ladies and gentlemen: As you approach the problems of this important task of citizenship, please keep in mind that it is your duty to weigh the evidence calmly and dispassionately without sympathy or prejudice for or against either the defendant, Mr. Gradowski, or the prosecution.

Our system of jurisprudence defines the duties of the judge, on the one hand, and duties of the jury on the other.

It is exclusively the function of the judge, as you know, to set forth the rules which govern the case with instructions as to their application.

In these legal matters you should take the law as I give it to you in the next few minutes, and you will not concern yourselves with any statements about the law which counsel make in their summations or at any other point during the trial.

For what I am sure are perfectly obvious reasons, you are not to single out any one of my remarks alone as stating the law, but you should consider my instructions or remarks as a whole when you retire to deliberate in this case.

I want to make it very plain to you at this point

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that my actions during the trial in passing upon motions, or applications made by counsel, or in overruling or sustaining objections made by one of the lawyers, are not to be taken by you as any indication of either guilt or innocence on the part of the defendant.

As I am sure you all understand, counsel not only have the right but, indeed, they have the duty to object to the introduction in evidence of any statements, or exhibits, or testimony which they believe should not be admitted under the rules governing these trials.

These are questions of law and procedure with which you should have no concern or consideration when you deliberate.

Similarly, I ask you to draw no inferences from the fact that upon one or perhaps several occasions I asked a few questions of one or more witnesses. These were intended only for clarification, or to expedite matters, and they certainly were not intended to suggest any opinions on my part as to the guilt or innocence of Mr. Gradowski, or whether one of the witnesses who appeared here may have more credibility than another witness.

Now, as Mr. Doyle and Mr. Bush both have been good enough to bring to your attention, under the system it is your recollection and your understanding of the evidence,

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and only your recollection and your understanding of the evidence, which can serve as the bases for your deliberations and discussions in this case. This proposition flows from the basic principle that you, the jury, must keep in mind at all times, and that is that you are the sole and exclusive finders of the facts based upon your recollection of the evidence.

Therefore, if you recall that one of the lawyers or the judge mentioned a certain bit or line of evidence, and that statement of the lawyer and the judge doesn't accord with your recollection of that particular evidence, please keep in mind that it is your duty to reject what one of the lawyers or the judge said and accept your recollection of those evidentiary matters as controlling.

Under our system the law presumes a defendant such as Peter Gradowski to be innocent of the charges of crime brought against him.

The indictment in our case, as you were told at the outset, is merely an accusation, or a pleading or a charge. It is not evidence or proof of the defendant's guilt, and it doesn't detract one whit from the presumption of innocence which resides in his favor.

As you were told early-on, the defendant, prior to trial, pleaded not guilty to each of these counts in this

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indictment, Counts 1 to 10, and Count No. 12. Thus, the government has the burden of proving the charges against Mr. Gradowski as laid out in these particular counts beyond a reasonable doubt.

Under our system, Mr. Gradowski doesn't have to prove his innocence. On the contrary, he is presumed innocent of the accusations contained in this indictment. That presumption was in his favor at the start, it is in his favor as I now speak to you, and it remains in his favor during the course of your deliberations in the jury room.

It is removed only if and when you are satisfied that the government has sustained its burden of proving the defendant's guilt beyond a reasonable doubt.

The question naturally comes up at this point as to what does the law mean by this concept reasonable doubt?

You could say that to a large extent the words define themselves. Reasonable doubt is a doubt founded in reason and arising out of the evidence in the case or perhaps lack of evidence. It is a doubt which a reasonable person has after carefully weighing all of the evidence. It means a doubt that is substantial and not just shadowy or ephemeral.

A reasonable doubt is one which appeals to your reason, your judgment, your conscience and your own experience

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in life. It is not caprice, whim or speculation.

It is not an excuse to avoid a difficult or unpleasant duty. It is not sympathy for the defendant.

Rather, ladies and gentlemen, the law succinctly defines reasonable doubt to mean a doubt which would cause prudent persons to hesitate before acting in matters of importance to themselves.

Finally, of course, on this subject, I should point out that a reasonable doubt doesn't mean beyond any doubt or all possible doubt. If the latter were the applicable standard, few if any men and women would ever be convicted of any charges.

As you know, it is practically impossible for a human being to be absolutely convinced of any controverted fact which, by its nature, is not susceptible of mathematical computation and certainty.

You will recall that the defendant Peter Gradowski, as is his right, determined not to testify at this trial or to give evidence of any kind at this trial. This must not be considered by you against Mr. Gradowski. It must not be considered by you as a basis for any presumption or inference in any way unfavorable to Mr. Gradowski.

As I have already stated, under our system a defendant is by no means to be required to prove his innocence.

Thus, as I say, you must not permit the fact that Mr. Gradowski determined not to testify to be in the slightest degree against him in the course of your deliberations.

Now, I think it has been made clear to you by counsel and by the judge, at least indirectly, that this case is to be decided only on the basis of admitted evidence during the trial in your presence in this room in the last several days.

Put differently, the case is not to be decided on the basis of anything you may have heard, or read, or learned somehow outside the courtroom and the trial process itself.

Basically, you are entitled to consider two forms of evidence, generally speaking, in your deliberations in this case:

The first general category of evidence I am talking about is direct evidence. Examples of direct evidence would be sworn testimony of the witnesses who appeared here in this chair on my immediate left and were sworn and gave evidence on direct and cross-examination.

Another form of direct evidence would be records, or documents, or papers, or other physical objects which were admitted into evidence in your presence during the trial.

Still another form of direct evidence would be stipulations of fact which were brought to your attention by

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one or both counsel during the trial.

As I recall it, the first day Mr. Bush read a stipulation of certain facts to which he and Mr. Doyle had agreed were true for the purpose of this case on behalf of their clients.

Now, this is all of the direct evidence, and the only direct evidence, of course, which you are to consider in your deliberations.

Any evidence to which an objection was sustained by the judge, as I am sure you understand, you should disregard.

Questions asked by the lawyers as well as questions asked by the judge, standing alone, of course are not evidence. It is only the answers of the witnesses taken in connection, of course, with the questions which they are answering, which are evidence, and of course, as you surely have been told by both lawyers, their opening statements and closing arguments to you are not evidence.

Now, the other general category of evidence which you are permited to consider is what is called frequently "circumstantial evidence." You have all probably used the term "circumstantial evidence" in your own daily lives, and, indeed, have relied on circumstantial evidence of a kind or kinds in order to make decisions affecting your

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own daily affairs at home or in your work.

Let me simply define "circumstantial evidence" for our purpose to mean evidence which doesn't itself directly establish a fact sought to be proved but instead may lead you to facts sought to be proved by the every-day process of reasoning or, as it is sometimes called, "inference."

Obviously, as you have already implied from my remarks in the last few moments, you of course are to apply your normal processes of reasoning and deliberating upon the evidence before you.

Let me just pause here and give an often-used simple illustration of circumstantial evidence. Indeed, you might say that this a somewhat homely example of circumstantial evidence.

I will ask you to assume for the purpose of this illustration that you were at home with a small child or grandchild and taking care of him, and he was a little fellow four or five years old, and you have him in the kitchen with the doors closed. And then something requires that you go out of the room for a few moments, and you leave him playing quietly at the table. And when you come back five or ten minutes later, you find that there in front of him on the table is an open jar of strawberry jam, there is strawberry jam smeared on his shirt and on his trousers,

and there is jam smeared on the table right around him.

Well, you can't say to him or anybody else that you actually saw him eat the strawberry jam from that jar, but because of the circumstances I have just described plus the additional circumstance which I will ask you to add, namely, strawberry jam on his lips, you would be entitled by circumstantial evidence to draw the inference or conclusion that he was the man or the little man who opened that jar and ate the strawberry jam.

All right. Now, I caution you that whether you are dealing with direct evidence or circumstantial evidence, of course you should keep in mind these presumptions and rules such as the presumption of innocence and the rule of reasonable doubt which I described or defined for you a mement ago.

I turn now to another subject, and it is an important one, and that is this: In every crime there must exist what I will call a "union" or "joint operation" of act and intent. The burden is always upon the prosecution, as government counsel know, to prove both act and intent beyond a reasonable doubt.

A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires to be done, intending, with bad purpose, either to

disobey or disregard the law, may be found to act with intent or as it is sometimes called, guilty knowledge.

Intent or guilty knowledge may be proved by circumstantial evidence. Indeed, it rarely if ever can be established by any other means. This is so for the simple reason that while witnesses may see and hear and thus be able to give us direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were either done or omitted.

What a defendant does or fails to do, however, may indicate intent or lack of intent to commit the offense or offenses charged.

In this regard I point out to you that the proof of the circumstance surrounding the transactions, or events, or conversations which have been testified to in this trial can supply an adequate basis for a finding that the defendant acted willfully.

You are all familiar with the old saying or the old saw that "The acts of a man must be set in their time and place." Similarly, you are familiar with the old saying that "Just as the meaning of a word is understood only in its relation to other words in a sentence, so the meaning of a particular act or failure to act may depend upon the circumstances surrounding it."

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Thus, you may consider the evidence which you recall and which related, not only to a given transaction, or conversation, or event, but as well to the surrounding circumstance in your consideration of this issue of intent or guilty knowledge, more about which I will say in a moment or two.

Parenthetically, let me point out at this juncture that it is not necessary for the prosecution to prove knowege of the accused that a particular act or failure to act is a violation of a specific statute or law. Unless and until it is outweighed by evidence to the contrary, the presumption is that every citizen knows what the law forbids and what the law requires to be done.

Now, I turn to the charges set forth in this indictment in which Peter Gradowski is named as a defendant or a co-defendant. I am going to treat these counts and discuss with you the law in three categories, or three groupings.

First I am going to treat Counts 1 through 4. Then I'm going to treat Counts 5 through 10. And finally, I'm going to treat Count 12.

Although the evidence and some of the legal principles overlap in respect to these groupings or counts, they are properly and easily discussed in the groupings I mentioned

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because they actually involve accusations of violations of separate statutes.

Let me turn to Counts 1 through 4. These counts, in very simple summary, charge the defendant with either possession on his part or the aiding and abetting of the posession of another of four checks alleged to have been stolen from the Chase Manhattan Bank here in town with knowledge that they were stolen from a bank.

Let me, however, read the indictment in significant part once again as I did at the outset of the trial.

You will remember there is an introduction portion of the indictment which reads as follows: "That from on or about the first day of September 1972 up to and including the 14th day of April, 1973 in this judicial district and elsewhere, Richard Nash and Peter Gradowski, defendants, unlawfully, willfully, and knowingly did devise a scheme and artifice to defraud the Chase Manhattan Bank, the Franklin National Bank, and Bankers Trust Company and to obtain money and property from the defrauded persons by means of fal and fraudulent pretenses, representations and promises. It was part of said scheme and artifice that Richard Nash and Peter Gradowski, the defendants, obtain posession of certain blank checks, to wit, printed checks designed for use by the Public Service Electric and Gas Co.

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and the Virginia Electric and Power Co. on their accounts at the Chase Manhattan Bank knowing said checks to have been taken and carried away with intent to steal in violation of Section 2,113 (B) of Title 18, United States Code from said bank the deposits of which were then insured by the Federal Deposit . . Insurance Corporation.

"It was further a part of said scheme and artifice that Richard Nash and Peter Gradowski, defendants, caused four of the aforementioned blank checks to be inscribed so that they were payable to the following false fictitious persons in the amounts set forth below."

Now, I will turn over to you a clean copy of this indictment when you retire to deliberate. Therefore, I will not read in detail the descriptions. Suffice it to say that two of these checks were what I call VEPCO or Virginia Electric & Power Co. checks with certain designated numbers.

Two were Public Service Electric & Gas Co. checks ostensibly. Two of the payees were Gary Essig and two of the payees were Murray Fischer for the amounts shown.

Now, the indictment here goes on to allege that "It was further a part of said scheme and artifice that Nash and Gradowski, the defendants, using the aforementioned false and ficititious names, Gary Essig and Murray Fischer,

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opened checking accounts at the bank set forth below, among others, and deposited the so-called spurious checks, that is, the checks, four in number, listed theretofore in said checking accounts and used and attempted to use said checking accounts and checks drawn thereon to collect the sums of money which were the subject of and inscribed on the so-called four spurious checks."

The checking accounts are then listed, one at the Chase Manhattan Bank in the name of Gary Essig, one at the Bankers Trust Company in the name of Murray Fischer, and the third at Franklin National Bank in the name of Gary Essig.

Then the indictment turns to specifically plead Counts 1 to and including 4. Here it is alleged that the allegations contained in the introduction of this indictment are repeated and re-alleged as though fully set forth herein.

Paragraph two alleges that on or about the dates hereinafter set forth in this judicial district Nash and Gradowski, the defendants, unlawfully, willfully, and knowingly did receive, possess, conceal, and dispose of money and property exceeding $100 in value, to wit, the so-called spurious checks, that is, the four checks heretofore described, and then set forth below as well, knowing said money and property to have been taken and carried away with

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intent to steal and purloin in violation of Section 2,113 (B) of Title 18, United States Code, from the Chase Manhattan Bank, New York, a bank the deposits of which were then insuredby the Federal Deposit Insurance Corporation."

Now, Count 1 relates to a check dated December 1, 1972 in the amount of $106,575.

Count 2 refers to the check dated December 1, 1972 also. This one is in the amount of $177,588.75.

Count No. 3 is a check dated December 5, 1972 in the amount of $42,675.

And Count 4, the last count in this group, refers to a check dated December 5, 1972 in the amount of $38,750.

Now, each of the first four counts, as their terms indicate, accuse the defendants--and for our purpose the defendant here on trial, Mr. Peter Gradowski--with a violation of a portion of Section 2,113 of the United States Criminal Code. Let me read you that in significant part.

That statutory provision provides, and I quote, "Whoever takes and carries away with intent to steal or purloin any property or money, or any other thing of value exceeding $100 belonging to or in the care, custody, control and management of a bank, shall be guilty of a crime."

Now, let me stop right there and point out that that particular provision is not really what the defendant

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Gradowski is accused of at all. I emphasize to you, as you have already been told by counsel, that Gradowski was not accused in this indictment, nor, for that matter, was Nash, of actually stealing these checks. That isn't the portion of this statute which the defendant Gradowski is accused of at all.

The statute then goes on to read, and this is the significant part for our purposes, "Whoever receives, possesses, conceals, stores, barters, sells or disposes of any property or money, or other things of value, knowing the same to have been taken from a bank, shall be guilty of a crime." And that is the core of this particular statutory language of which Mr. Gradowski is accused of violating.

In other words, in simple terms, he's accused of either having possession or having received one or more of these four stolen checks with knowledge that they were stolen and that they were stolen from a bank, and that bank was insured by the Federal Deposit Insurance Corporation.

Now, let me read what lawyers call in simple language the "Federal aiding and abetting statute." That statute, which is another section, Section 2 of the United States Criminal code, reads in significant part as follows: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its

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commission, is punishable as a principal.

In very simple language, as I will develop in a moment or two, that statute means that you can be just as guilty as the principal so long as you know what was going on, and you do something knowingly to aid and abet what's going on of a criminal nature, or put still differently, you have a stake in the enterprise and you actually do something in an attempt to see that the criminal enterprise or event succeeds.

Now, in order to find Peter Gradowski guilty of Counts 1, 2, 3 or 4, you must be convinced beyond a reasonable doubt of the following essential elements: First, that on or about the dates set forth in these counts, or one of them, the defendant Gradowski knowingly and willfully either received or possessed, or concealed or disposed of money or property with a value in excess of $100, or he aided and abetted another, such as Nash, in so doing.

Now, in the context of this first essential element, as I am sure you understand, the government contends that the thing or things of value of more than $100 are each of these checks which are listed in each of these first four counts.

The second essential element that you must find proved beyond a reasonable doubt is that such money or prop-

erty, to wit, one of these checks, had been taken or carried away, or stolen from a bank by some individual or individuals who had the intention to steal or "purloin" them, to quote the statutory phrase.

The third essential element is that there must be proof to your satisfaction beyond a reasonable doubt that Peter Gradowski acted knowing that the check or checks, or money had been taken from a bank.

Notice, I didn't say that it had to be taken from a particular bank but that it had been stolen from a bank.

The fourth and last essential element that must be proved beyond a reasonable doubt to your collective satisfaction is this: That the deposits of the bank, in this case, of course, the Chase Manhattan Bank, at the time this money or property, or in other words, these checks or one of them was taken, was a bank insured by the Federal Deposit Insurance Corporation.

Now, in respect of this last or fourth essential element, as I recall it, there was testimony by a bank official that the Chase Manhattan Bank was so insured at all relevant times and, indeed, I don't really think that the defendant makes any contest about this. However, it is one of the essential elements, and I ask you to be satisfied that there was proof beyond a reasonable doubt that the Chase

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Manhattan Bank was a bank whose deposits were insured by the Federal Deposit Insurance Corporation.

Now, a critical or hotly disputed element in regard to Count 4 is the so-called third essential element. Specifically, the element of proof that Peter Gradowski knew that the check or checks in question had been taken and carried away from a bank by somebody or some persons who had the intent to steal or purloin the check.

In this regard I repeat, it is not necessary for you to find that the defendant Gradowski actually stole or participated in the larceny of these checks, if such in fact occurred, or that he even knew the person or persons who did steal them if they did steal them.

In addition, it is not necessary for you to find that the defendant or even the person or persons who actually stole these checks, if they in fact did so, knew that the Chase Manhattan Bank at the time was insured by the Federal Deposit Insurance Corporation.

Now, let me point out that the government makes a number of arguments having to do with the critical issues of knowledge on the part of Gradowski that these checks were stolen.

The first argument, and really the basic argument they make is that you should determine that Gradowski had

possession of some of these checks, or, at the very least, he aided and abetted with knowledge possession by Nash of these checks.

And then the government would argue that anybody looking at the face of these checks would understand that they had to be stolen because of their very nature and description.

Now, of course, Mr. Gradowsky argues to just the contrary. He argues that he never had possession in any event, and that he never had anything to do with these checks, and therefore, for that simple reason alone, he couldn't know that these checks were stolen or that they were stolen from a bank.

Well, these are arguments for you and for you alone to determine.

Now, I have mentioned that the government's theory is that certain of these checks are shown by the evidence to actually have been in the possession of Gradowski. But the government says to you, "If you are not satisfied that that is so, at the very least you should be satisfied that Gradowski was aiding and abetting another, most importantly Nash, in the illegal and knowing possession and use of these checks with knowledge, among other things, that the checks had been stolen from a bank.

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Now, let me repeat in a little more detail what the law means by this concept of a co-schemer or aiding and abetting somebody in the commission of a federal crime.

In order to find that one is a knowing aider and abetter, or, as it was sometimes put to you by argument here, a co-schemer in this context, you will have to be satisfied that Gradowski knew what was going on, i.e., that he knew this was a scheme to possess and use these stolen checks with the purpose of defrauding the bank by using the proceeds of these checks for some of the purposes of Gradowski and Nash or one of them.

Second of all, you have to determine that not only did he know that was going on, but he was something more than a knowing spectator, that is to say, that he had a stake in the enterprise and that he actually did something or attempted to do something to see to it that the scheme was carried on and completed.

Now, by that I don't mean that you have to be satisfied not only of the elements that I just mentioned but also that the scheme succeeded. You don't have to be convinced that the scheme succeeded at all. I repeat, you have to find, in order to determine that Gradowski is an aider and abetter, that he knew what was going on, that he knew this was a scheme to receive, conceal, possess and use these

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checks in order to defraud the bank and to use the fruits of these checks for their own selfish purpose of either Nash or Gradowski or both, or with perhaps some persons whose names we haven't heard as such in this case.

Second of all, you have to be satisfied that Gradowski did something more than merely knowing that this scheme existed and was going on. You have to be satisfied, in addition, that he had a stake in the scheme and that he did something or attempted to do something to have the scheme succeed.

Now, you will remember that in reading the elements I pointed out to you that the first element is that the defendant knowingly and willfully received, possessed, concealed, or disposed of one or more of these checks and aided and abetted in this and that these checks were property valued in excess of $100.

That is based on a portion of the statute that I read to you.

Thus, there are some questions or there may be a number of questions about this value issue which you will come to consider and decide, and I therefore want to elaborate further on this value question.

Now, if you are satisfied that the other essential elements were proved, and you are considering this value

question, keep in mind that the government argues to you that their proof shows that the value of each of these checks is very much in excess of $100. Indeed, the government's prime contention is that the actual value, certainly to the knowledge of the co-schemers, or the defendant Gradowski and anybody else such as Nash,was that they were the value as written in on the face of these checks.

Well, in the sense of the term value as here,as it is used here, under the law, value means the highest market value of the property, that is to say, the particular check you are considering, had at any point in time it was in the possession of either the defendant Gradowski or the defendant Nash, or one of their accomplices.

Now, market value may be that established for the check in the legitimate market or, for that matter, it may be, dependant upon the proof of the value that it would have on the black market. I think that it is not necessary to go into any discussion of the latter theory because,as I understand it, the government contends that the market value here shown by the evidence--and certainly they would argue that the understanding of Gradowski and Nash and anybody else involved--was the amount shown or written in on these checks.

Indeed the government argues that if you recall the evidence there is evidence that these checks initially

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cleared and that there is further evidence of attempts, at least, by Gradowski and others, to use the proceeds of these checks, such as the evidence as to what went on at H. Hentz & Co., for example.

Well, assuming you recall that evidence, and believe it, and place that evaluation on it, you would be entitled to draw the inference that at the time or times these checks were in the possession of Gradowski or Nash or someone of their confederates, the reasonable market value as the evidence shows was the actual face amount of these checks.

Now, under the statute which I read to you, I point out that the statute goes on in another portion which I haven't read to you, that the fact finders in a given case, such as you the jury in this case, might still convict a defendant, such as Mr. Gradowski, of what lawyers call a lesser included offense if you were to determine that the only real market value these checks had was something less than $100.

Therefore, I am going to ask you, when you return your general verdicts in this case, in respect to Counts 1 to and including 4, to report to us if you find guilt on the part of the defendant Gradowski in respect to any one or more of these first four counts, whether or not you

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determine the value of the check having to do with that count as being more than or less than $100.

Now it is important to keep in mind in this context, obviously, value isn't the only issue here. In other words, the only significance this value question would have is if you were to determine that each of the other essential elements which I spelled out for you a moment ago have been proved beyond a reasonable doubt in so far as the defendant Gradowski, here on trial, is concerned.

Now, I turn to Counts 5 through 10, and these are the counts which lawyers call in shorthand terms mail fraud counts.

Let me read them to you. Paragraph one here alleges as follows:

"The allegations contained in the introduction to this indictment are repeated and re-alleged as though fully set forth therein."

Paragraph number two:

"On or about the dates hereinafter set forth in this judicial district the defendants Nash and Gradowski

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unlawfully, willfully and knowingly, for the purpose of executing the scheme and artifice set forth in the introduction of this indictment, did place and cause to be placed in post offices and authorized depositories for mail certain letters to be delivered by the postal service, to wit, the letters addressed as hereinafter set forth and thereby knowingly caused said letters to be delivered by mail according to the directions thereon."

Now, each of these counts is based upon a separate alleged mail matter.

Count 5 charges a mailing dated November 14,1972. The sender was the Irving Trust Company, and the addressee was Inter-Tran, Personnel Department, 133 East 58th Street, New York, New York.

As I recall the evidence, that was a letter or as it is sometimes called, a signature verification inquiry sent by Irving after the attempt to open a bank account at the Irving was under way.

Count 6 charges a mailing on November 22 of last year. The sender is the Franklin National Bank, and the addressee is Mr. Luiz Osorio, Inter-Tran, with the same address, 133 East 58th Street here in Manhattan.

Count 7 is a mailing dated November 4, 1972. Bankers Trust Company is the alleged sender, and again the

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addressee is Inter-Tran Inc. at 133 East 58th Street.

Count 8 is a November 24, 1972 letter from the 25 East 57th Street branch of the Chase Manhattan Bank, and the addressee is Inter-Tran at 133 East 58th Street.

Count 9 is a mailing allegedly taking place on November 27, 1972 and here the sender is Inter-Tran, and the addressee is Bankers Trust Company at 605 Third Avenue.

And the last of this group is Count 10 in which the date is stated to be late November or early December, 1972. The sender is said to be Franklin National Bank, and the addressee is said to be Gary Essig at that address, 200 West 20th Street here in New York.

Now, as you know, the government again here contends that certain of these counts involve mailings which the defendant Gradowski directly caused to be mailed by his own actions. The government admits that it was Nash, according to their proof, posing as Gary Essig, who actually directly caused the mailings, but the government's theory with respect to the latter is that this was all part of a common scheme in which Gradowski was a knowing participant and that therefore you should be persuaded beyond a reasonable doubt that he was aiding and abetting even those mailings that Nash in the more direct sense was responsible for.

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In any event, in order to find Gradowski guilty of any one of these counts, 5 to and including 10, you would have to be satisfied beyond a reasonable doubt of the following essential elements:

First, that on or about the date set forth in the count in question, the defendant Gradowski either devised or was a knowing member to a scheme or artifice to defraud as alleged in this indictment.

Second: That in either devising or being a knowing member of such scheme or artifice, the defendant acted with knowledge of its fraudulent nature and with the intent to defraud.

Third: That the defendant either used or caused another to use the United States mails for the purpose of implementing or executing this fraudulent scheme, or alternatively, as I have pointed out, that the defendant aided and abetted in the using or vausing another to use the United States mail as an integral part of the implementation of this scheme.

As you will recognize, the law states that each separate mailing constitutes a separate offense if such you find under the facts.

Now, let me pause here and point out certain things that have to do with these essential elements.

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First, let me deal with what is meant by a scheme or artifice. As you know, the scheme or artifice here in question is factually alleged in the so-called introduction and then it is repeated again with reference, for example, to these mail counts as well as other counts.

For our purposes, a scheme or artifice is merely a plan for the accomplishment of some object or end. In this case, of course, the object or end which the government contends is a scheme to fraudulently obtain money from the bank, and, to use that money for their own purposes, that is, co-schemer's own purposes.

Obviously, the law doesn't require that the scheme or artifice be shown as a formal or written plan, and its existence may be established both by direct evidence and by circumstantial evidence.

Now, when the term fraud is used here in these indictment allegations it is a term meant and intended to embrace all of the means by which an individual can devise to gain an advantage over another person or company or a bank, for example, by means of false representatio or false suggestion or by deliberate concealment of relevant and material facts.

Therefore, a scheme or artifice to defraud, then, means any plan or device by which one seeks by fraudulent

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means to induce another to act in a way detrimental to his interests or monetary position.

Now, obviously, as you can tell from any discussion of the essential elements so far in respect to Counts 5 to and including 10, the so-called mail fraud counts, use of the mails is the third essential element which you must find established here.

As I have stated, in respect to this element, the government must prove that the defendant Gradowski either used or caused the mails to be used or aided and abetted in causing the mails to be used for the purposes of executing the scheme or artifice to defraud.

It is not necessary, however, under the law, that the matter mailed be shown to contain within its four corners anything criminal, or to disclose the fraudulent scheme. In other words, the mailing standing alone can be as innocent as any letter that you can think of.

The point is, you will have to be satisfied that it was a letter which was mailed in furtherance of the scheme in question.

Now, I also point out to you that under the law the proof doesn't have to show that Gradowski himself personally mailed the item or letter or communication in question. All you have to find is that one of the defendants

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caused the mailing by taking steps which he knew at the time might naturally and probably result in the use of the mails.

Indeed, it is not necessary that the government prove as to the defendant Gradowski, that he even knew of the specific mailing in each case. It is sufficient if you find that he participated knowingly in the scheme to defraud as I have already said and that he could reasonably have foreseen that the mails would be used at some point along the line in partial furtherance of the scheme or artifice.

Now, I point out to you, although this may be obvious to you by this point, that although the government certainly has the burden of proving the essential elements of the scheme to defraud as I have just been discussing them with you, it need not prove that the scheme actually achieved its objective.

The crime is complete, in other words, when the proof shows that the scheme was actually conceived and that the mails were used in an attempt to fulfill or complete the scheme or artifice here alleged.

Now let me take up with you some other elements which have arisen by argument and also by virtue of certain evidence offered and admitted into the trial of this case.

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But before I do that, I almost overlooked Count 12 which I have not yet discussed, and I beg your pardon. I thought I had. I had not. Let me interrupt and go back and turn to Count 12.

Count 12, as you know, is a relatively briefly stated count is which Gradowski only is named as a defendant. Count 12 reads as follows: Paragraph one. "The allegations contained in the introduction and in Counts 5 through 10 of this indictment are repeated and re-alleged as though fully set forth herein."

Paragraph two: "From on or about the first day of September 1972 up to and including the 14th day of April, 1973 in this judicial district Peter Gradowski, the defendant, unlawfully, willfully and knowingly and for the purpose of conducting, promoting and carrying on the scheme and artifice, did use, assume and request to be addressed by a fictitious false and assumed name, specifically that of Murray Fischer."

Now, in order to support a conviction of Mr. Gradowski under Count 12 you would have to be satisfied of the following essential elements:

First, you will have to be satisfied beyond a reasonable doubt that sometime within the period of the dates I just read to you the defendant Gradowski either devised or was a knowing party to the scheme and artifice

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to defraud.

And further, you would have to find that not only was he a party and a knowledgeable one but that he understood or should have understood that one of the means of carrying on the scheme was the use of the postal service or use of the mails, if you will.

Second, you must be satisfied beyond a reasonable doubt that in devising or being a party to this scheme in a knowing fashion the defendant acted with knowledge of its fraudulent nature and with the intent to see the fraudulant scheme succeed.

Third and last, you would have to be satisfied that the defendant used the false and fictitious name or that he requested it be be used as an address or a name for mailing or a name for reference or a name for a deposit or something of that nature.

Now I think that there is no purpose in dilating further on these elements. In part I have already discussed them in relation to other counts and the same meanings would apply here.

Now, you know that one of the contentions of the government is that after he was arrested, Gradowski was brought from Suffolk County, on the same day, to this courthouse and he went into the office of the Assistant United

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States Attorney by the name of Edwards and he was interviewed, and that was brought out and what he said to the officials at that time was brought out.

Now, the government says that some of that material at the very least was false and knowingly so. Therefore, the government argues that these false matters should be considered by you as an indication or the basis for the inference that Gradowski gave false information because he was guilty, and knew he was guilty.

Well, that is that the law sometimes calls false exculpatory statements, or something of that nature.

Suffice it to say here, first of all, you have got to decide whether he gave knowingly false information. Maybe he did or maybe he didn't. You alone decide that.

Second of all, if you decide that he gave what was false evidence or of information to the government lawyers or agents, you have got to decide whether or not you want to draw the inference that this is an indication of guilty knowledge on his part.

It is solely up to you. You can either draw that inference or not as you see fit.

Now, the government also points to evidence to the effect that a warrant for the arrest of Gradowski amon others was obtained some time in January of this year but

it wasn't until September of this year that Gradowski was caught and arrested, and the government says that, and other evidence shows that he took flight and went to Florida and Las Vegas, Nevada, and perhaps other places, and the government argues to you, as they are entitled to argue, that this is an indication of flight on his part, and further, that flight is evidence or the basis for an inference of guilty knowledge on the part of Gradowski.

Again, first of all, you have got to decide whether you accept this testimony and believe it, and second of all, if you do, you have got to decide whether or not you want to draw this inference. It is solely up to you. You may draw the inference or not as you see fit.

Now, this morning, you remember, I gave you a cautionary instruction and an explanation of certain evidence which I will call the evidence of a Miami bank transaction.

Very simply, you will remember that the court permitted the government to produce as a witness Mr. Price who said he was a bank officer of a bank in Miami and he told us about certain dealings with a man whom he identified as Gradowski calling himself William Dolemen, and certain bank records of these events, early this year, were admitted into evidence.

Now, I told you then, and I repeat, that of course

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Mr. Gradowski is not charged with any criminal conduct in the direct sense in this indictment having to do with any Miami Bank transactions. You know that.

The only significance or possible significance and relevance of this evidence, assuming that you believe it, is evidence tending to indicate similar acts as the government argues.

Or, put differently, evidence tending to show the identify of Gradowski and his methods of operation.

The government contends that if you analyze this and accept it as true, it is a method of operation very, very similar to the methods of operation which they say that Gradowski and Nash used in respect to Irving Trust and the Chase Manhattan, for example, and therefore, the government argues that you should draw the inference from that guilty knowledge and intentions and identify of Gradowski. And again, it is up to you to decide whether or not you believe that evidence, and whether you wish to determine that it is similar sufficiently to show a similar method of operation and then shed some light on the question of guilty knowledge on the part of Gradowski in the general sense and his identify. As you know, identify is a hotly contested issue here.

In respect to identify, you may recall that

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that one or more witnesses were showed several photographs and asked to identify which if any, was of the defendant.

Gradowski says that the photographs in the line-up or display were insufficient to support any kind of identification of him at the time or now.

The government argues to the contrary. The government argues that these witnesses have been specific both in the line-up with the FBI agents before trial and in their in-court identifications.

You heard both sides of that argument. You have got to decide whether the identity of Mr. Gradowski has been established. That's solely up to you.

Now, the lawyers have at least implied if not stated, and correctly, that you and you alone are the persons who decide the credibility of witnesses who appeared before us in this relatively short trial. That is true.

You are also the only ones to decide the weight their evidence deserves.

Now, in this process, which is important, you are entitled to consider such obvious criteria as the demeanor or the looks of the witness as he sat here and gave his testimony on direct and cross, the strength or weakness of recollection of past events, the extent to which is testimony is corroborated by documents in evidence, or by testimony of other witnesses, any motive which he might have

to obfuscate or conceal or distort the truth, any interest which he might have in the outcome of this case.

Obviously, these are important criteria which you would use in your daily lives in a business, or personal decision. You should use these criteria here.

To sum up, you are entitled to accept or reject in whole or in part the testimony of any witness who appeared here during our trial depending on how you assess his credibility.

Now, one other point on witnesses. You know that we have heard from several Federal Bureau of Investigation Agents in this case. I'm sure you understand this but nevertheless I point out to you that just because these men are government agents doesn't mean that their testimony is entitled to any special presumption or inference of truth.

Put differently, you are entitled to assess their credibility just as you would the credibility of any other witness, including private persons.

Now, under our system we will require from you a unanimous general verdict on each of the counts here on trial. That is Counts 1 through 10, and Count 12. Count 11, as you well know, doesn't mention or accuse Peter Gradowski of anything, and therefore it is not before you.

What I mean by a unanimous general verdict is obviously this: On each count you shall report through

your foreman Mr. Evans-Bey whether you find Gradowski guilty or not guilty of that particular count. And whichever decision you make it must be unanimous.

Now, remember that I also pointed out that with respect to Counts 1 to and including 4 if you find the defendant Gradowski guilty of any one or more of those counts, I wish you would also tell us whether you find the value of the check in respect to that particular count to be worth more or less than $100.

Now, I am sorry that I had to take so long but under the law I was obliged to take so long in order to cover, in reasonable completeness, the subjects and issues at hand.

You have been very patient with me, you have been very patient with the lawyers. I'm going to ask you to sit patiently where you are for a moment and I'm going to try to see if we can't have Mr. Gradowski and the lawyers come in with me. I want to give them a chance to comment on my instructions in case I left something out or misstated something unwittingly. And then we will come back and commit the case to you.

(In the robing room.)

THE COURT: Mr. Bush.

MR. BUSH: The government would request the

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following: First, I think the court mis-spoke as to two relatively minor factual matters.

THE COURT: I have no doubt. If you think of the law in one of these cases this is a Byzantine nightmare for any trial judge, even one like me who has been through it.

What did I say wrong?

MR. BUSH: I believe you referred in Counts 1 through 4 of the indictment to the effect that the checks were dated December 1 and December 5.

In fact, the dates alleged in there, it was the intention of the government to cover the dates. The checks were actually deposited and that's what those dates reflect.

THE COURT: Yes, you are right.

MR. BUSH: Secondly, you said that there was testimony concerning the fact that Chase is insured by the Federal Deposit Insurance Corporation. I frankly forget whether there has been or has not been but I do know there was a stipulation to that effect.

THE COURT: There is no point in saying any more on that. I told them there was no contest so I think you might be right but I am going to leave that one alone.

MR. BUSH: Thirdly, the government would request

that you charge the jury with respect to the use of a false name, a request which was submitted to the court.

THE COURT: You are right and I left it out and I will tell you why. It seams to me, to repeat that in the context of this case is only susceptible of confusion and possible unfairness, and I just don't think it is necessary.

What I am saying bluntly is, since Count 12 is perfectly obvious, even to one unlearned in the law, that should suffice. I am not going to emphasize that again although technically you are right.

First of all you are right you submitted it and second of all I suppose technically it ought to be given in most cases but not here.

MR. BUSH: Finally with respect to the charge it is--I don't believe the court mentioned that there could be a variance in dates which would not be significant and would not effect the guilt or innocence of the defendant, and the government would request that.

THE COURT: You are right about that. That was inadvertent.

MR. BUSH: And on another matter--

THE COURT: Let us not get into any other matters. There's a jury sitting out here.

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MR. BUSH: I understand, but this is directly related. I called the attention of the court clerk to the fact that juror No. 3 was taking notes throughout the closing.

THE COURT: I am going to take care of that. Thank you for reminding me. I know about that. That's right.

Mr. Doyle?

MR. DOYLE: Your Honor, I respectfully except to that portion of your Honor's charge concerning aiding and abetting in which your Honor stated that it is sufficient if the defendant has knowledge of the scheme and that he also had a stake in the venture and did something to see that the scheme was carried on and completed and I request your Honor to charge that the defendant should also have done something to aid or abet each and every act which is alleged to have been a count in the indictment.

THE COURT: I refuse to so charge. I think to the extent that you are right I have already said it properly enough and I won't say anything more.

MR. DOYLE: I think it is just dangerously close to conspiracy, your Honor, and there is a difference.

THE COURT: Well, be that as it may, you have an exception.

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MR. DOYLE: Secondly, I except to that portion of your Honor's charge which permits the jury to conclude that the value of the checks could be the highest value that it had at any time after the inscriptions were made on the checks, and that's a point that was covered earlier.

THE COURT: Yes, I understand. Exceptions to you.

MR. DOYLE: That's all, your Honor.

THE COURT: All right. Now gentlemen, I will speak to the note taker who was No. 3, and I will also, gentlemen, in case there is not a verdict here, and I don't think there will be one very soon, I am going to send these people home. I'm not going to lock them up for the night and I'm not going to keep them late at night.

There are too many people here who come from rather different areas of town and I just don't want to do it and there is no threat to the sanctity of the trial with proper instructions and I just wanted to let you all know that that's probably what I will do, probably around 6:00 o'clock.

(In open court.)

THE COURT: Mr. Evans-Bey, ladies and gentlemen, I am indebted to the lawyers for pointing out two slips of the tongue which I made inadvertently.

First, in discussing Counts 1 to and including 4,

I gave the dates alleged but erroneously stated or implied that those were the dates of the checks, that is the dates placed on the checks. That's not so. The dates that are alleged there are the dates when the government contends that the checks were actually taken for deposit in one or another of these banks.

Now, while I am on the subject of dates, I should point out to you that as you well know from my several readings of the indictment's allegations, there are rather specific dates in several instances where accusations are made.

If you were to determine that the event or events in question didn't take place on the exact date alleged, that would not mean that you would have to acquit assuming you otherwise were convinced that the government has proved its case.

Put differently, the law recognizes that so long as the event or events shown to have taken place at or very close to the date or dates in question, that is sufficient.

Now, one final thing before we swear the marshal and commit the case to you for your deliberation.

It has been brought to my attention that one of your number, at least, was taking some notes during the arguments of counsel. That's a perfectly human and natural

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thing, but I must tell you that under the system notes by individual jurors are not allowed for good and historical reasons that I will not bore you with at this moment.

The important thing is that those of you who did take notes, I would ask to turn the notes over to Mr. Bows, the clerk of this court, as you retire with the marshal to deliberate.

Now, I have here a clean copy of the indictment.

Now, I call to your attention that on page four, where Counts 5 through 10 are alleged, you will see pencil check marks in the margin. Those are just pencil check marks of mine and they have no significance whatsoever.

I did that through nervousness or concentration or something or other when I was speaking to you. But I am going to turn that over to you to use as a guide for your deliberations only, of course.

Now, can we have the marshal sworn.

(Two marshals were sworn.)

THE COURT: Now, before the jury retires, it is my duty to excuse you, Mrs. Koch, and you Mr. Gridell even though you sat here long and attentively these past three days, the system requires that we excuse you with our thanks now.

What news do we have for Mrs. Koch and Mr. Gridell?

THE CLERK: Tuesday morning, your Honor, 9:30

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in Room 706. Not Room 905 but Room 706, Tuesday morning at 9:30.

THE COURT: Monday, which I had overlooked last evening, there is some kind of a federal holiday, and that means Tuesday morning next week, 9:30 in Room 706, which is two flights down from here.

Good night and God speed.

Ladies and gentlemen of the jury, you may retire.

(At 4:55 o'clock p. m. the jury retired to commence its deliberations.)

THE COURT: Gentlemen, let me just indicate on the record that I have gone through the Grand Jury minutes and Mr. Bush's notes which perhaps to his surprise I find very readable and understandable both in substance and in handwriting, and I have also been grateful to go through the law partly with your help, Mr. Doyle, in that compendium which you loaned us and I am satisfied that my ruling earlier today was correct.

In other words, first of all, it is clear that Mr. Bush did exactly as he represented he did. He was abundantly cautious with the Grand Jury the last time to point out that this was, in effect, hearsay evidence, in part, and he certainly emphasized that.

Second of all, the original evidence before the

original Grand Jury was a great deal of the important evidence which we heard here, so it wasn't hearsay in a real sense at all. And I believe under existing case law that the government is right. This is sufficient to withstand a motion of the kind that you perfectly properly made, Mr. Doyle, but I reiterate my conclusion on that and deny the motion and I return to you, Mr. Bush, the important folio, the minutes, etc., including your notes.

Now, I take it gentlemen, that you will either be here or if you are going to be out of the room you will have a precise telephone where we can reach you.

(Recess.)

(5:25 o'clock p. m.)

THE COURT: The jury has sent in a note but I think before we mark it as an exhibit I would like you , gentlemen, to read this. And then we will decide what to do with it.

I am not sure I understand that note in all of its particulars, quite frankly.

MR. BUSH: Might I just comment on it briefly?

THE COURT: Yes, certainly.

MR. BUSH: With respect to the first portion concerning the testimony of Tattam and Cinnamon, that seems to me fairly clear with one possible--

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THE COURT: I agree with that. That I understand.

MR. BUSH: With one possible exception to that, and that would be whether the testimony of the FBI Agent as to what Tattam and Cinnamon had done previously should be included.

As far as the signature form from Bankers Trust is concerned, I'm afraid that could be one of a few documents. It could be the document which was signed initially when he went into the bank. I suppose it could be the signature letter which was sent out and then returned through the mail.

That is a little unclear although I think it could be broken down to manageable proportions.

THE COURT: Well, the best way, it seems to me, would be to ask the jury, but in any event I get your point on that. That's one portion I didn't really understand at all.

MR. BUSH: The two checks containing Fischer's signature, similarly, I think it would have to be clarified somewhat, to give them a number of documents.

I assume they mean the endorsement on the bank but there is an envelope of checks with his endorsement.

The letter referred to in Count 9 seems to me to be fairly clear.

I have to refresh my recollection as to what Count 9 is again.

THE COURT: Well, I'm going to have some help since I gave them my only copy of the indictment.

MR. BUSH: Count 9 was the count which says that on or about November 22nd a letter was sent from Intertran Inc. to Bankers Trust, and in actuality that was just the same letter that was sent out having been returned to them as you will recall from the testimony.

THE COURT: Well, the only trouble is I am not, off hand, sure of the exhibit number.

MR. BUSH: That I can give you.

THE COURT: Was that identified by --

MR. BUSH: By Mr. Tattam. That was the exhibit over which we had the--

THE COURT: I assume it is 9 but I'm not sure.

MR. BUSH: That is correct, your Honor.

THE COURT: Exhibit 9?

MR. BUSH: Exhibit No. 9.

THE COURT: Well, may I see the note now?

It will take Mr. Barron a little time to isolate this business. I think the only sensible thing to do, gentlemen, unless you have an objection or a better solution, is to have the jury come in and have the judge ask

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them to help us a little as to exactly what they want about these two checks, or the signature form from Bankers Trust or both.

Would that be all right with you?

MR. DOYLE: Agreeable, your Honor.

MR. BUSH: Acceptable to the government, your Honor.

THE COURT: Well, we will ask the jury to come in then.

While we are waiting I would assume what they want in the first portion is that portion of the direct and cross as to what Tattam or Tattam and Mr. Cinnamon said so far as identifying the defendant.

(Jury present.)

THE COURT: Mr. Evans-Bey and ladies and gentlemen, we have your note and we are, frankly, having some difficulty in being certain as to exactly what you want in regard to some of your questions here.

For example, you ask for something called the signature form for Bankers Trust.

Now, I assume that you mean that signature verification letter which was introduced when Mr. Tattam was here on the stand.

JUROR NO. 3: Yes.

MR. FOREMAN: Yes,I think so.

THE COURT: Well, that happens also to be the letter which you asked for, the letter referred to in Count 9. That's Government's Exhibit 9 as I think counsel for both sides will agree with me.

That, we have available and ready, right?

MR. BUSH: That is right, your Honor.

THE COURT: All right. Now, you also ask for two checks containing Fischer's signature.

Now, my recollection is, and the lawyers seem to have a similar recollection, that there were several checks, or more than two, in other words, which had a signature of Murray Fischer, most likely in most instances that I recall, which have an endorsement on the back, but perhaps there is some specific identification that you can give us that will help us understand what you want.

JUROR NO. 3: There were the two allegedly stolen checks.

THE COURT: Oh, I see. I think that helps. So that would be the two checks referred to in Counts 1, to and including 4 where Murray Fischer was the--

MR. BUSH: Those are Government's Exhibit 21 and 23, your Honor.

THE COURT: All right. So we will keep those

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available.

JUROR NO. 3: Also, could you add the check endorsed by Fischer to H. Hentz & Co.?

THE COURT: A check endorsed by Fischer to H. Hentz?

We have two checks here, one made out to H. Hentz & Co. by Murray Fischer and one made out by Gary Essig to Murray Fischer and then endorsed to H. Hentz.

JUROR NO. 3: We want both of them.

THE COURT: You want both of them, all right.

Now, you also asked, of course, for the verbatim testimony of Tattam and Cinnamon identifying the defendant.

Now, we do not have a transcript as such, and therefore, it is necessary for that and other reasons that this testimony be extrapolated and read to you by the court reporter and this not quite as easy a job as you and I might think.

Mr. Barron hasn't had a chance to complete that task.

I think that what I'm going to do is to direct that these exhibits which you now clarified as to what you want to see be held separately for you, and then I'm going to have you disperse and go home now, and come back in the morning, at which point we will then have extrapolated this

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testimony of Mr. Cinnamon and Mr. Tattam that you wish.

Now, it is important for you to listen very carefully to what I am about to say. It is important in fairness to both sides in this lawsuit. And, indeed, to your deliberations.

First of all, though you are free to go home, it is absolutely imperative that you not discuss this case or your deliberations with anybody, and that includes the members of your family, and your closest friends.

This case is nobody elses business now but yours, so don't discuss it with anybody, lawyers or anybody. Don't discuss it. It is not anybody's business but yours.

Second of all, it is imperative that you be here, God willing, and railroads, and subways, and all the rest of the things, really, tomorrow at 9:30 sharp so that we can get started and read this material, that you wish, to you. So if you would go to your jury room tomorrow and be there at least no later than a few minutes before 9:30, we will call you in and we will be able to read whatever it is along these lines of Tattam and Cinnamon that you requested.

Now the third thing, and I have no reason or expectation that this will happen, but precaution in advance is perhaps better.

If anybody should stop you or ask you questions about this case, you put them off, and not only that, if this should happen you tell me about it tomorrow when you come in.

Now I emphasize, I don't expect anybody is going to do this but I want to explain to you what your position should be if anybody accosts you and asks you anything about this case.

Now, with that, I will say to you that you go home now and put this case out of your mind and come back here promptly before 9:30 tomorrow morning.

We will see you then.

(At 5:37 o'clock p. m. the jury left the courtroom.)

(Note from jury marked Court's Exhibit 1.)

THE COURT: Gentlemen, let me say in frankness, in addition to wanting to give Mr. Barron time to extrapolate this material for you to see it so that you will know what it is, I also didn't want our jury to be under any pressure given the hour of the day, and it is for those two reasons that without any advance consultation with you I decided the better course for those two reasons would be to do what I said just now, to disperse the jury with those instructions until 9:30 tomorrow morning.

I will see you then.

(Adjourned to Friday, October 9, 1973 at 9:30 o'clock.